SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 295

FLORENCE SAMUELS LANDRESS, PETITIONER,

vs.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY AND TRAVELERS INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE EASTERN DISTRICT OF TENNESSEE

At Law. No. 1804

FLORENCE SAMUELS LANDRESS

vs.

PHŒNIX MUTUAL LIFE INSURANCE CO.

and At Law. No. 1805

FLORENCE SAMUELS LANDRESS

vs.

TRAVELERS INSURANCE COMPANY

Consolidated Causes

STIPULATION AS TO RECORD ON APPEAL

I

The transcript of the records in the State Court, except such parts thereof as are hereinafter called for, need not be included in the transcript of the record on appeal, it being agreed that each of the above suits was commenced in the Circuit Court of Hamilton County, Tennessee, and, the plaintiff being a citizen of the State of Tennessee residing in the Southern Division of the Eastern District of Tennessee and the defendant a citizen of a State of the United States other than the State of Tennessee, was, on a petition duly filed, properly removed to the United States District Court for the Southern Division of the Eastern District of Tennessee.

II

The transcript of the record on appeal shall consist of the following:

(1) This stipulation.
(2) The declaration in each of the consolidated cases.
(3) The motion in each case to make the third count more specific.
(4) The demurrer in each case.
[fol. 2] (The exhibits to the demurrers will not be copied but will be sent up without copying.)
(5) The motion in each case to amend the motion with respect to the third count.
(6) Order consolidating the two cases.
(7) Final judgment entered in consolidated causes.
(8) Plaintiff's exception filed in the consolidated causes.
(9) Memorandum opinion of Judge Taylor.
(10) Petition for appeal and assignment of errors.
(11) Order granting appeal.
(12) Citation.

William L. Frierson, Atty. for Plaintiff. Vaughn Miller, Atty. for Defendant Phœnix Mutual Life Insurance Company. J. F. Finley, Atty. for Defendant Travelers Insurance Company.

IN UNITED STATES DISTRICT COURT

DECLARATION IN No. 1804—Filed in State Court November 29, 1930

The plaintiff, Florence Samuels Landress, sues the defendant, in court by service of process, for $20,000.00 due her on two certain policies of insurance on the life of her husband, Thos. L. Landress, and for cause of action, says:

First Count

(1) Plaintiff is the widow of Thos. L. Landress, who died August 5, 1930. At the time of his death there were in full force and effect two certain policies of insurance issued by defendant under its numbers 381,932 and 522,049, re- [fol. 3] spectively, which policies are here to the Court shown. By the terms of said policies, the defendant in consideration of the premiums paid, agreed and bound itself to pay the plaintiff the sums of $10,000.00 and $5,000.00 respectively, upon receipt at its home office of due proofs of

the death of the said Thos. L. Landress, and further agreed to pay the plaintiff as double indemnity the additional sums of $10,000.00 and $5,000.00 respectively upon receipt of due proofs that said death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or indirectly, wholly or partly from disease, or physical or mental infirmity.

(2) After the death of her said husband, plaintiff furnished defendant at its home office due proofs of death on blanks furnished by it showing that said death had occurred under the circumstances hereinafter stated, and demanded of defendant the double indemnity. Defendant accepted said proofs of death without objection, and has paid without prejudice to plaintiff's rights the amount that would have been due on said policies if said death had not been accidental within the meaning of said policies, but has refused and declined to pay the double indemnity. Said refusal was not in good faith within the meaning of the Tennessee statute imposing a penalty for refusal to pay, and as a result, plaintiff has been forced to bring this action and is entitled to recover damages at least to the extent of the reasonable fees of her attorneys in this case.

(3) The death of plaintiff's said husband occurred under the following circumstances. He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on the afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two. An autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death.

(4) Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or in- [fol. 4] directly, wholly or partly from disease or from

physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $20,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Second Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of paragraphs (1), (2) and (3) of the first count thereof, and says further:

At the time plaintiff's said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent, and accidental causes not directly or indirectly, wholly or partly from disease or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000,00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

Third Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

'At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amount-

ing to a mental or physical infirmity within the meaning [fol. 5] of the policies, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental causes not directly or indirectly, wholly or partly from disease, or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00, with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Fourth Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and the double indemnity provisions of said policies do not exclude the risks incident to playing golf. It was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental causes not directly or indirectly, wholly or partly from disease, or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

[fol. 6] IN UNITED STATES DISTRICT COURT

DECLARATION No. 1805—Filed in State Court November 29, 1930

The plaintiff, Florence Samuels Landress, sues the defendant, in court by service of process, for $14,000.00 due her on a certain policy of accident insurance issued by the defendant to her husband, Thos. L. Landress, and for cause of actions says:

First Count

(1) Plaintiff is the widow of Thos. L. Landress, who died August 5, 1930. At the time of his death there was in full force and effect a certain policy of insurance issued by defendant under its number MD-39182, which policy is here to the court shown. By the terms of said policy the defendant, in consideration of the premiums paid, agreed and bound itself to pay to the plaintiff the sum of $10,000.00, upon the receipt by defendant of proofs of the death of her said husband within ninety days after his death, in the event his death should result from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means.

(2) Upon the death of her said husband, plaintiff caused immediate notice to be given the defendant and within ninety days after said death furnished it with due proofs of death, on blanks furnished by it, showing that said death had occurred under the circumstances hereinafter stated, and demanded payment of said $10,000.00. Defendant accepted said proofs of death without objection but has refused and declined to pay said $10,000.00 or any part thereof. Said refusal to pay was not in good faith within the meaning of the Tennessee statute imposing a penalty for refusal to pay, and, as a result, plaintiff has been forced to bring this action and is entitled to recover damages at least to the extent of the reasonable fees of her attorneys in this case.

(3) The death of plaintiff's said husband occurred under the following circumstances: He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any

disease or any mental or physical infirmity and was playing golf as he often did, when the weather was such as it was on that day, and as many others did without injury on the same afternoon and on the same golf links. But while [fol. 7] so playing he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two.

(4) Wherefore plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

Second Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action, reiterates and adopts the allegations set out in Paragraphs (1), (2) and (3) of the first count hereof, and says further:

At the time her said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Third Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action reiterates and adopts the allegations of [fol. 8] Paragraphs (1), (2) and (3) of the first count hereof, and says further:

At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed.

Wherefore, plaintiff says that the death of her said husband resulted directly or independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Fourth Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and said policy does not exclude the risks incident to playing golf. It was only by chance that, on the day in question, plaintiff's husband happened to be the one, out of the many playing, with whom the rays of the sun came in contact in such a way as to cause injury.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum

of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO MAKE THIRD COUNT MORE SPECIFIC—Filed in No. 1804, January 23, 1931

Defendant moves for an order requiring plaintiff to make the third count of her declaration more specific with respect to the allegations in the second paragraph thereof touching the alleged "temporary disorder or condition" of assured's body, by specifying:

(a) The nature, character and extent of such temporary disorder or condition;

(b) The portion or portions of assured's body affected by such temporary disorder or condition;

(c) The reason or reasons why such temporary disorder or condition are claimed to have rendered assured more than ordinarily sensitive to the heat of the sun.

Miller, Miller & Martin, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION TO MAKE THIRD COUNT MORE SPECIFIC—Filed in No. 1805, January 23, 1931

Defendant moves for an order requiring plaintiff to make the third count of her declaration more specific with respect to the allegations in the second paragraph thereof touching the alleged "temporary disorder or condition" of assured's body, by specifying (a) the nature, character and extent of such temporary disorder or condition, (b) the portion or portions of assured's body affected by such temporary disorder or condition, and (c) the reason or reasons why such temporary disorder or condition are claimed

to have rendered assured more than ordinarily sensitive to the heat of the sun.

Finlay & Campbell, Attorneys for Defendant.

[fol. 10] IN UNITED STATES DISTRICT COURT

DEMURRER IN No. 1804—Filed January 23, 1931

Defendant demands oyer of the policies of insurance mentioned in the declaration, and the same being read to defendant as follows (the copies of said policies which are hereto attached, and marked Exhibits "A" and "B," respectively, are hereby made a part hereof as fully as if here copied), defendant demurs to the first, second and fourth counts of the declaration because it appears on the face thereof that—

I

The action is to recover the double indemnity benefit payable under the policies only in event insured's death resulted "directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes," whereas this insured's death did not result "directly and independently of all other causes from bodily injuries effected solely through external, volent and accidental causes."

II

The policies provide that said double indemnity benefit shall not be payable if insured's death resulted "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease," whereas this insured's death did result "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease."

III

Insured's death did not result from bodily injuries.

IV

Insured's death did not result from bodily injuries effected solely through external and/or violent and/or accidental causes.

V

If insured's death resulted from bodily injuries, within the meaning of the provision in question, the cause or causes that produced such bodily injuries were not external and/or accidental.

[fol. 11]

VI

The external cause or causes, if any, resulting in insured's death were not accidental within the meaning of the provision in question.

VII

The external cause or causes, if any, resulting in insured's death were his voluntary acts, intentionally performed in subjecting himself to the heat of the sun and in his physical exertions incident to playing golf under external physical circumstances known to insured, wherefore such cause or causes were not accidental within the meaning of the provision in question.

VIII

Nothing was done, happened or occurred, except insured's resulting illness and death, that was not planned and foreseen by insured, wherefore his death did not result from any cause or causes that were both external and accidental.

IX

While doing exactly what he intended to do, in the exact manner in which he intended to do it, insured simply exposed himself to the heat longer than his body could endure, wherefore if his death resulted from any external cause or causes, such external cause or causes were not accidental within the meaning of the provision in question.

X

In so far as insured's death resulted from the causes alleged, it resulted from means voluntarily employed in a not unusual or unexpected way; in the acts or occurrences preceding the alleged injury nothing unforeseen, unexpected or unusual occurred which produced it; wherefore the alleged injury did not result through accidental causes.

Miller, Miller & Martin, Attorneys for Defendant.

[fol. 12] IN UNITED STATES DISTRICT COURT

DEMURRER IN No. 1805—Filed January 23, 1931

Defendant demands oyer of the policy of insurance mentioned in the declaration, and it being read to defendant as follows: (The copy of said policy, which is hereto attached and marked Exhibit "A," is hereby made a part hereof as fully as if here copied), defendant demurs to the first, second and fourth counts of the declaration because each of said counts shows on its face that:

I

The action is to recover the sum payable under the policy only in the event insured's death resulted "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," whereas this insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

II

The policy provides for insurance "against loss resulting from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," whereas this insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

III

The benefit under the policy is not payable if insured's death resulted directly or indirectly, wholly or partly from physical or mental infirmity or disease, whereas this insured's death did result directly or indirectly, wholly or partly from physical or mental infirmity or disease.

IV

Insured's death did not result from bodily injuries.

V

Insured's death did not result from bodily injuries effected solely through external and/or violent and/or accidental means.

VI

If insured's death resulted from bodily injuries within the meaning of the provision in question, the means that produced such bodily injuries were not external and/or accidental.

[fol. 13]

VII

The external means, if any, resulting in insured's death were not accidental within the meaning of the provision of the policy in question.

VIII

The external means, if any, resulting in insured's death were his voluntary acts, intentionally performed, in subjecting himself to the heat of the sun, and in his physical exertions incident to playing golf under external physical circumstances known to insured, wherefore such means were not accidental within the meaning of the provision of the policy in question.

IX

Nothing was done, happened or occurred, except insured's resulting illness and death, that was not planned and foreseen by insured, wherefore his death did not result from any means that were both external and accidental.

X

While doing exactly what he intended to do, in the exact manner in which he intended to do it, insured simply exposed himself to the heat longer than his body could endure, wherefore if his death resulted from any external means, such external means were not accidental within the meaning of the provision of the policy in question.

XI

In so far as insured's death resulted from the causes alleged, it resulted from means voluntarily employed in a not unusual or unexpected way. In the acts or occurrences preceding the alleged injury, nothing unforeseen, unexpected or unusual occurred which produced it, wherefore the alleged injury did not result through accidental means.

Finlay & Campbell, Attorneys for Defendant.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION IN NO. 1804 TO AMEND MOTION WITH RESPECT TO THIRD COUNT—FILED APRIL 18, 1931

Now comes defendant and moves for leave to amend its motion, heretofore filed and not yet disposed of, by adding at the end thereof the following:

"Defendant further moves that in event plaintiff is unable or for any other reason declines to make said allegations more specific in the respects above specified, an order be entered striking the said allegations constituting the second paragraph of said count."

Miller, Miller & Martin, Attorneys for Defendant.

MEMORANDUM IN SUPPORT OF MOTION

The foregoing motion to amend is based on admissions in plaintiff's brief recently filed (in opposition to the demurrer to the first, second and fourth counts) that the allegations in question are based not on any facts, but simply on a supposed inference from the occurrence of the sunstroke as alleged in the other counts. This is dealt with in defendant's reply to plaintiff's said brief, to which the Court is respectfully referred.

Miller, Miller & Martin, Attorneys for Defendant.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION IN NO. 1805 TO AMEND MOTION WITH RESPECT TO THIRD COUNT—FILED APRIL 20, 1931

Now comes defendant and moves for leave to amend its motion, heretofore filed and not yet disposed of, by adding at the end thereof the following:

"Defendant further moves that in event plaintiff is unable or for any other reason declines to make said allegations more specific in the respects above specified, an order be entered striking the said allegations constituting the second paragraph of said count."

Finlay & Campbell, Attorneys for Defendant.

MEMORANDUM IN SUPPORT OF MOTION

The foregoing motion to amend is based on admissions in plaintiff's brief recently filed (in opposition to the demurrer to the first, second and fourth counts) that the allegations in question are based not on any facts, but simply on a supposed inference from the occurrence of the sunstroke as alleged in the other counts. This is dealt with in defendant's reply to plaintiff's said brief, to which the Court is respectfully referred.

Finlay & Campbell, Attorneys for Defendant.

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER OF CONSOLIDATION—Entered May 20, 1932

It appearing that the above entitled two cases involve the same or similar questions and that, in each of them, a demurrer to the first, second, and fourth counts, a motion to make the third count of the declaration more specific, and a motion to amend said motion has been filed, it is, on motion of plaintiff and by consent of all parties, ordered that said two causes be consolidated and proceed hereafter under the title "Florence Samuels Landress vs. Phenix Mutual Life Insurance Company No. 1804 at Law and Florence Samuels Landress vs. Travelers Insurance Company No. 1805 at Law—Consolidated Causes." The right, however, is reserved to any of the parties to have said causes segregated and tried separately if said demurrers shall hereafter be overruled either by this Court or on appeal.

Approved for entry.

George C. Taylor, Judge.

O. K.

W. L. Frierson, Miller, Miller & Martin, Finley & Campbell.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—Entered May 20, 1932

These consolidated causes came on to be heard on the demurrers to the first, second and fourth counts of the

declaration and the motions to make the third count more specific and to amend said motions so as to move that the third count be stricken in the event plaintiff should fail to make said count more specific, said demurrers and motions having been filed in the above styled causes separately before the order of consolidation.

[fol. 17] And the Court, after considering briefs and hearing argument of counsel with reference to the issues so raised, orders and adjudges as follows:

(a) That said demurrers to the first, second and fourth counts be and they are hereby in all things sustained.

(b) That said motions to make the third count of the declarations more specific be and they are hereby sustained.

Thereupon plaintiff by her counsel admitted and agreed that she was unable to make the third count of the declarations more specific in the matter complained of by said motions with respect thereto, whereupon defendants' motions to amend their motions to make the declaration more specific, by moving to strike the third count, were duly allowed; and said motions to strike were by consent of all parties treated as demurrers to the third count, embracing all of the grounds of said demurrers to the first, second and fourth counts, and the Court, on due consideration thereof, in connection with plaintiff's said admission, orders that said demurrers be and they are hereby in all things sustained.

It is accordingly ordered that these suits be dismissed and that defendants respectively recover of plaintiff and the sureties on her cost bond, Williams & Frierson, all of the costs of the respective causes, for which execution may issue.

Approved for entry.

George C. Taylor, Judge.

Williams & Frierson, Attorneys for Plaintiff. Miller, Miller & Martin, Attorneys for Defendant. Finlay & Campbell, Attorneys for Defendant.

[fol. 18] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXCEPTION—Filed May 25, 1932

The plaintiff in each of the causes consolidated under the above title excepts to the action of the Court in sustaining demurrers to her declarations and dismissing her suits.

Williams & Frierson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed April 23, 1932

This case is before me on defendant's demurrer to the First, Second and Fourth counts of the declaration, and motion to make more specific the allegations of the Third count or else to strike from said count the second paragraph thereof, that is, the portion of the Third count alleging that at the time the insured received the injury which resulted in his death there was unknown to him a temporary disorder or condition of his body, not amounting to physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun; and that this temporary and unknown condition intervened between him intentional act of playing golf, which he intended and expected to perform safely, and which others did perform safely at the same time and place, and the injury which followed.

These allegations of this count of the declaration were intended to distinguish the case from that of Nickman v. New York Life Ins. Co., 39 Fed. (2nd) 763, and to bring it within the principle applied in the case of United States Mutual Assoc. v. Barry, 131 U. S. 100.

The case has been before me for a long time, and I have hoped all along to find time to review somewhat carefully the cases dealing with the questions presented, but it ap- [fol. 19] pears that to further delay the case is not justified by the possibility of having such later opportunity. It would seem the opportunity for full consideration and expression of opinion is constantly growing less by reason of increased trial work and pressing routine matters growing out of insolvency and receivership cases. I shall now

content myself with a brief statement of the matters involved, as I understand the case, with assurance to counsel that brevity of opinion is not evidence of lack of full consideration.

The suit is upon an insurance policy providing for double indemnity only in the event the assured's death was caused by bodily injuries, effected solely through external, violent and accidental means.

The only question presented is whether under the allegations of counts First, Second and Fourth the insured's death was under such circumstances as to create liability under the double indemnity provision. The material portions of the declarations are:

"First Count. He was accustomed to play and did play golf frequently in the afternoons during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day and as many others did without injury on the same afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two.

"Second, third and fourth counts contain additional allegations as follows:

"Second Count. He was engaged in his accustomed recreation in which he and thousands of others constantly engaged in without injury even on hot days and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act on his part. It did not happen according to the usual course of things or as expected.

"Third Count. There was, unknown to him, a temporary [fol. 20] disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policy, which, for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary

and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which resulted in his death.

"Fourth Count. Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and said policy does not exclude the risks incident to playing golf. It was only by chance that, on the day in question, plaintiff happened to be the one, out of many, playing with whom the rays of the sun came in contact in such a way as to cause injury."

It will be observed the declaration is carefully and skillfully drawn to bring it as nearly as may be, within the provisions of earlier decisions.

It is urged in support of the demurrer to these counts that sun stroke is a disease and not a bodily injury, due to violent and external means. In support of this contention there is respectable authority. I think the weight of authority is to the effect that as between the insurer and the insured the demurrer could not be sustained upon this ground; that sun stroke is not a disease. It is not necessary, however, to a decision to so hold.

The Third count of the declaration is attacked by a motion to make its allegations more specific. Under the conformity act attacks upon pleadings of this sort are to be tested by the State practice, and no case has been cited, and I have found none, dealing with the exact question. The alleged defect in the count is raised by this motion, and whether the motion is well taken or otherwise depends, I think, upon whether the allegation "at the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition of his body, not amounting to a mental or physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun," brings to the defendant a sufficiently clear statement of the matter relied upon by plaintiff as basis of liability. It is urged, in effect, that every temporary disorder or condition short of mental [fol. 21] or physical infirmity is susceptible of particular description; that the language employed in the declaration

amounts only to a legal conclusion without any allegation of fact that would enable defendant to prepare to controvert the existence of the fact. The complained of portion of the count apparently undertakes, by elimination, to state a cause of action. The purport of the count is that the insured was playing golf under the same conditions, and at the same time many others were playing who were not injured; that he was not suffering from any physical or mental infirmity, as shown by the autopsy; that he was injured and therefore there must have been some condition other than physical infirmity which made the difference between the result in his case and the result in the case of all others playing at the same time who were not injured, and that he did not know of the existence of the condition. The motion attacks this pleading as withholding from the defendant that reasonable particularity of pleading required to enable it to make defense without incurring the labor and expense of preparing to meet the insured's claim that any one of perhaps several conditions existed to which he attributed the unusual result.

Counsel for the defense state that in event the motion to strike or make more specific is overruled a demurrer to the Third count will be filed just as to the others. Counsel for plaintiff admit that they are unable to make the allegations of fact more specific; that the condition which existed at the time is as unknown to them now as it was unknown to the insured.

Treating the motion to make more specific as sustained and treating the briefs filed in opposition to the motion as admitting inability to make the pleadings more specific, and treating then the motion to strike that portion of the count as a demurrer, the whole case, according to my view, may be disposed of in this memorandum, unless counsel should desire to make up the record by taking the usual steps hereinabove assumed.

I agree with the reasoning in the case of Hess v. Travelers Ins. Co., 299 Penn. 125, 149 Atlantic 96, repudiating the Fourth Circuit case of Mutual Life Ins. Co. v. Dodge, 11 Fed. (2nd) 486. I am of opinion this case correctly interprets the case of U. S. Mutual Assoc. v. Barry, 131 U. S. 100. I am of opinion further that the Sixth Circuit Court of Appeals in the cases of Nickman v. New York Life Ins. Co., 39 Fed. (2nd) 763, and Hope v. Prudential Ins.

[fol. 22] Co., 29 Fed. (2nd) 185, and the case of Maryland Casualty Co. v. Moosey, 38 Fed. (2nd) 724, has clearly settled the distinction between unexpected, unusual or accidental result and accidental means or causes leading to a given result.

If as to the Third count of the declaration it may be said that there was existing within the insured's body and unknown to him some disorder or condition short of mental or physical infirmity which caused the rays of the sun or the applied heat to produce a different result from that in the case of others, under otherwise identical conditions, such condition was not accidental because unknown. It was a means, in that view, neither accidental, external nor violent. The Barry case has no such import. The means or cause leading to the result determine the question of liability. That the result was unexpected, unusual or unintended creates no basis for conclusion that a means or cause thereof was accidental, even is unknown. Hypersusceptibility or more than usual sensitiveness to an external application of force is not accidental means.

The demurrer to all of the counts is sustained.

George C. Taylor, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 15, 1932

Florence Samuels Landress, the plaintiff in the two suits consolidated under the above title, prays an appeal from the judgment entered in said consolidated causes sustaining a demurrer to her declaration in each of the consolidated causes, and dismissing her suits entered in the above consolidated causes on the 20th day of May, 1932, to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors, which is filed herewith.

Williams & Frierson, Attorneys for Petitioner.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 15, 1932

The plaintiff in each of the above causes, as grounds for her appeal from the judgment sustaining demurrers to her declarations, assigns as error the following:

I

All four of the counts in each declaration alleged that insured, "while in his usual good health and not suffering from any disease or any mental or physical infirmity" and while playing golf in the afternoon of August 5th, 1930 "as he often did when the weather was such as it was on that day, and as many others did without injury on that afternoon and on the same golf links," "was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two."

This stated a case within the terms of the policy sued on in the first of the above causes which provided for payment if the insured's death resulted "directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or indirectly, wholly or partly from disease or physical or mental infirmity," and also within the terms of the policy sued on in the second of the above causes which provided for payment if insured's death should result "from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means."

II

The second count in each declaration, in addition to the allegations mentioned above, alleged that insured "was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural, or reasonably to be expected result of playing golf"; that insured was playing, "unconscious of any danger from the heat or the sun, and the injury which followed was not one which followed in a not unusual or unexpected way from an intentional act of his"; and that "did not happen according to the usual course of things or as expected." And thus a case within the terms of both policies was stated.

[fol. 24] III

The third count in each declaration repeated the allegations of the first count and added that, unknown to the insured, there was a "temporary disorder or condition in his body, not amounting to a mental or physical infirmity

within the meaning of the polic-es, which for the time being rendered him more than ordinarily sensitive to the heat of the sun"; that "this temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed."

This stated a case within the terms of the policies sued on.

IV

The fourth count repeated the allegations of the first count and added that:

"Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incident of that game"; that the terms of the policies sued on "do not exclude the risks incident to playing golf"; that "it was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury."

This stated a case within the terms of the policies sued on.

Williams & Frierson, Attorneys for Plaintiff.

[fol. 25] IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed June 17, 1932

The petition of the plaintiff in the above titled consolidated causes for an appeal from the final judgment is hereby granted and appeal is allowed.

George C. Taylor, Judge.

Citation, in usual form, showing service on Vaughn Miller and J. F. Finlay, filed June 22, 1932, omitted in printing.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(May 11, 1933—Before: MOORMAN, HICKS and SIMONS, JJ.)

This cause is argued by W. L. Frierson for Appellant and by Vaughn Miller and J. F. Finlay for Appellees and is submitted to the Court.

JUDGMENT

(Filed June 6, 1933)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed June 6, 1933)

Before MOORMAN, HICKS and SIMONS, Circuit Judges.

HICKS, Circuit Judge. Florence Samuels Landress, widow of Thomas L. Landress, brought separate suits against appellees, Phoenix Mutual Life Insurance Company and Travelers Insurance Company. That against the Phoenix Company was upon two similar insurance policies which provide double indemnity only in the event that insured's death resulted "directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental causes;. . . ." The Phoenix Company contested double liability. The suit against the Travelers Company was upon a single policy which provided for insurance against loss resulting only from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means . . ."

The declarations in both cases are similar and embrace four counts. The principal averments upon which appellant relies are contained in the first and third counts. The second and fourth vary in expression but do not differ so materially from the first as to require or justify separate consideration. The third paragraph of the first counts alleges that,—

> "The death of plaintiff's said husband occurred under the following circumstances. He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on the afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two."

And the third counts after adopting the first, second and third paragraphs of the first counts, contains the following additional averments,—

"At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policies, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed."

The cases were consolidated in the District Court. Appellees demurred to all the counts in each declaration except the third and moved to make the third more specific, or, in the alternative, to strike the second paragraphs thereof. These motions to make the third counts more specific were sustained. Thereupon appellant announced that she was unable to comply with the order and by consent the motions to strike were treated as demurrers embracing all the grounds of demurrer to the first, second and fourth counts. The demurrers of each defendant are similar and each contains eleven grounds. Both were sustained by the court. The essence of the one as to the Phoenix policy was that the declaration showed upon its face that the insured's death did not result "directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental causes;" and as to the Travelers policy that the declaration showed upon its face that the insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means, . . ."

Upon the averments of the first, second and fourth counts of the declarations we think it is clear that the case must be ruled by *Nickman* v. *New York Life Ins. Co.*, 39 Fed. (2) 763 (C. C. A. 6). These counts disclose that the operating cause of insured's death was his voluntary exposure to the heat of the sun while playing golf. The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than what he intended.

The averments of the third counts present the cases in a somewhat different aspect.

As to the Phoenix policies the averment was that the "accidental cause" of death was the unknown, temporary condition of the insured's body which rendered it supersensitive to the heat of the sun. As to the Travelers policy it was similar except reference was made to the "accidental means" by which death was effected rather than the accidental cause of death. The averments were similar as to all three policies that this condition was an external and violent cause or means of death; but there was no allegation that the insured's idiosyncrasy was accidental or that it was produced by other than a natural cause. It is stated that the insured's peculiar physical condition intervened between his act in playing golf and the injury which followed, but this is not sufficient. These third counts of the declarations wholly fail to allege, and we think could not consistently aver, that the insured's temporary disorder was a mischance, "slip or misstep" in the acts or conduct of insured while playing golf in a high temperature. Conceding that the disorder was a mishap it did not in any way alter or interfere with the insured's voluntary course of conduct while playing. It was simply a condition and if it had not existed we must assume that the insured would not have died; but it was not the accidental operating cause of his death nor the accidental means which brought it about.

We think the case must be controlled by *Mutual Accident Assn.* v. *Barry*, 131 U. S. 100, as interpreted and construed by *Maryland Casualty Co.* v. *Massey*, 38 Fed. (2) 724, 725 (C. C. A. 6) and *Pope* v. *Prudential Ins. Co.*, 29 Fed. (2) 185, 187 (C. C. A. 6); see also *Nickman* v. *New York Life Ins. Co., supra; Order of United Commercial Travelers of America* v. *Shane*, 64 Fed. (2) 55, 59 (C. C. A. 8).

Some of the cases which adopt a contrary view have been considered and analyzed in the Massey, Pope and Nickman cases herein cited. A further discussion of them could add nothing of value.

Finally, if we could construe the third counts of the declarations as averring that the hyper-susceptibility of the insured's body to excessive temperature was the accidental cause of his death, we are still confronted with the proposition that such was not the independent cause of death or independent means through which it was effected. *Hesse* v. *Travelers Ins. Co.*, 299 Penna. St. 125,

129. Nor was it a violent and external cause or means in the sense of the indemnity provisions of the policies. See *Order of United Commercial Travelers* v. *Shane, supra.*

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Florence Samuels Landress* v. *Phoenix Mutual Life Insurance Company and Travelers Insurance Company* No. 6238, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 24th day of June, A. D. 1933.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,898. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 295. Florence Samuels Landress, petitioner, vs. Phœnix Mutual Life Insurance Company and Travelers Insurance Company. Petition for a writ of certiorari and exhibit thereto. Filed July 28, 1933. File No. 295, O. T., 1933.

(4173)

FILE COPY

FILED

JUL 28 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 295.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

PETITION FOR CERTIORARI AND SUPPORTING BRIEF.

WILLIAM L. FRIERSON,
Attorney.

R. H. WILLIAMS,
R. P. FRIERSON,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. ————————.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Florence Samuels Landress, prays that the writ of certiorari be granted to review the judgment of the Circuit Court of Appeals for the Sixth Circuit rendered June 6, 1933, whereby that Court affirmed the judgment of the District Court for the Southern Division of the Eastern District of Tennessee sustaining demurrers and dismissing petitioner's suits (Rec., p. 27).

THE CASE.

Petitioner sued the two respondents, in separate suits, in a state court, on policies of accident insurance in which her husband was the insured and she was the beneficiary. The suits were properly removed to the United States District Court, and there, by consent of parties, consolidated (Rec., pp. 1 and 16).

CAUSE OF ACTION.

The insured was overcome by heat while playing golf and died. The policies sued on provided for payments to petitioner if the death of her husband should result, in the case of one respondent,

> directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and not directly or indirectly, wholly or partly, from disease or physical or mental infirmity (Rec., p. 3).

And, in the case of the other respondent,

> from bodily injuries effected directly or independently of all other causes, through external, violent and accidental means (Rec., p. 6).

THE DECLARATION.

Each declaration contains four counts, and all the counts, after setting out the provisions of the policy and alleging

compliance with respect to proofs of loss, alleged the circumstances of insured's death in this language:

> He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on that afternoon and on the same golf links. But while so playing he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two. An autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death (Rec., pp. 3-5 and 6-8).

The second count added this:

> At the time plaintiff's said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected (Rec., pp. 4 and 7).

The fourth count added this:

> Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and the double indemnity provisions of said policies do not exclude risks incident to playing golf. It was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury (Rec., pp. 5 and 8).

And the third count added this:

> At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity withing the meaning of the policies, which, for the time being, rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury followed (Rec., pp. 5 and 8).

THE DEMURRERS.

Employing various forms of expression, the demurrers, in their eleven grounds, insist that, on the facts alleged, insured's death did not result from bodily injuries effected through external, violent and accidental means (Rec., pp. 10-13).

GROUNDS OF DECISION BELOW.

The court below, agreeing with the Court of Appeals in the case of Order of United Commercial Travelers v. Shane, 64 Fed. (2nd) 55, held that the first, second and fourth counts failed to state a cause of action because it did not affirmatively appear that, in the act of playing golf, anything intervened to cause insured to do anything he did not intend to do or in a way he did not intend, and rejected the idea based on the third count that ignorance of a condition which made the otherwise safe playing of golf dangerous, converted the otherwise intentional act of playing into an unintentional and, therefore, accidental act (Rec., pp. 29 and 30).

REASONS FOR GRANTING WRIT.

1. **Important questions of general law.**

The language in question is and has been for years used by most insurance companies in their accident policies. It is the subject matter of almost constant litigation throughout the United States. Its proper interpretation and legal effect and the rules of law applicable to it are matters of very general interest and importance.

2. **Conflict with the decisions of other Circuit Courts of Appeals.**

The decision in this case and that in the Shane case, supra, with which it agrees, are in sharp conflict with

the decisions of the Circuit Courts of Appeals in several of the circuits.

The Shane case, quoting from a Missouri case, makes this very clear statement of the conflicting views on the same subject:

> There are two clearly defined lines of cases on this question. One holds that, where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mistake occurs, in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen.
>
> The other line of cases holds that, where injury or death is the unusual, unexpected or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, mischance, slip or anything out of the ordinary in the act or event which caused such injury or death.

This case and the Shane case take their places in the first line and, in effect, announce the rule that when injury follows an intentional act, whether it be one which is ordinarily safe and from which no injury is reasonably to be expected and whether it be done with or without knowledge of conditions which made it dangerous, such injury cannot be said to be effected through accidental means unless it affirmatively appears that something unin-

tentional on the part of the insured occurred to prevent him from performing the act in the manner intended.

On the other hand there are numerous cases in the Second Circuit (Aetna Life v. Brand, 265 Fed. 6), the Third Circuit (Maryland etc. v. Spitz, 246 Fed. 817), the Fourth Circuit (Mutual Life v. Dodge, 11 Fed. [2] 486), the Fifth Circuit (State Life v. Allison, 269 Fed. 93), and the Ninth Circuit (Jensma v. Sun Life, 64 Fed. [2] 457), which are in the second line of cases.

These cases adhere to the rule that an injury, though following an intentional act, is effected by accidental means if it is something which usually or in the ordinary course of things does not result from such an act, and hence is not reasonably to be expected.

3. **Error below.**

Upon both reason and authority the judgment below is erroneous.

Wherefore, it is respectfully submitted that the writ prayed for should be granted.

WILLIAM L. FRIERSON,
Attorney.

R. H. WILLIAMS,
R. P. FRIERSON,
Of Counsel.

BRIEF.

The opinion of the court below is reported in 65 Fed. (2), at page 232. And it will be insisted that:

(1) The writ of certiorari should be granted.

(2) The judgment below is erroneous.

I.

THE WRIT SHOULD BE GRANTED.

1. **Importance of the question.** The language in question has been in general use for more than half a century and its legal effect is of great interest to thousands of policy-holders and to practically all companies which insure against accidents. It has been and still is the subject of frequent litigation. Divergent views with respect to it have been expressed by both federal and state courts and members of the same court. And this diversity of views has grown out of differing interpretations of an opinion of this Court.

2. **Conflict with other Circuits.** As stated in the petition, there are two sharply conflicting lines of cases. They divide on whether when an ordinarily harmless act is followed by an injury which, in the ordinary course of things, is not reasonably to be expected, it can, without more, be said that the injury is effected through accidental means.

The decision below answers this in the negative. Giving no weight whatever to the allegations that insured's act in playing golf was one which he was accustomed to perform in perfect safety and which others performed at the same time and place without injury and from which harm was not, in the ordinary course of things, to be expected, the Court stated its conclusions thus:

> "These counts disclose that the operative cause of insured's death was his voluntary exposure to the heat of the sun while playing golf. The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than what he intended" (Rec., p. 29).

If there could be any misunderstanding, it would be removed by the fact that the Court approved Order of United Commercial Travelers v. Shane, 64 Fed. (2) 55, and that case expressly disapproves the cases which do not require an affirmative showing that the insured was, by some accident or mishap, prevented from performing the act in the manner intended.

This is exactly the opposite of the rule which prevails in several of the other circuits. The rule there applied is that one is presumed to intend the ordinary and reasonably to be expected results of his voluntary act. Hence when injury is to be reasonably expected, it is not brought about through accidental means. But when the act is an ordinarily harmless, or, like playing golf, a healthful one,

from which, in the usual course of things, injury does not result, the insured is presumed to have intended and expected to perform it safely, especially if others do perform it without harm at the same time or if he is accustomed to so perform it himself. And if he is ignorant of some fact or condition which, if known, would have deterred him, this ignorance is the accidental element which prevents the act, as performed, from being intentional. In all these cases there is a presumption that the injury was brought about through accidental means.

Ninth Circuit. The latest case is Jensma v. Sun Life Insurance Company, 64 Fed. (2) 457. Death of insured followed the administration of an ordinarily harmless hay-fever remedy. The remedy was administered in exactly the way intended. The contention was that, since, to warrant recovery, the injury must have been produced through accidental means, "it will not suffice if it merely appears that it was accidental in the sense that it could not reasonably have been anticipated."

But the Court rejected this contention, citing, among other cases, Lewis v. Ocean Accident etc., 224 N. Y. 18, in which Mr. Justice Cardozo said:

> "But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the ordinary man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary and unlooked-for mishap,

and so an accident. The test—the one that is applied in the common speech of men—is also the test to be applied by the courts."

And the Ninth Circuit Court of Appeals, stating its own conclusion, said:

"In the present advanced state of medical science such a tragic result from a simple hay fever injection is 'unforeseen, unexpected, unusual.' As we have already intimated, we need not know at what precise instant of time, by what precise instrumentality, or through what precise avenue the deadly organisms entered the insured's body; for it is in the very nature of an accident that its exact causes should not be susceptible of mathematical demonstration.

"All the substantial evidence requires the conclusion that death was the result of violent, external and accidental means."

Second Circuit. Aetna Life Insurance Company v. Brand, 265 Fed. 6. The insured was operated on. In performing the operation, and sewing up the wound, the surgeon did exactly what he intended. But it happened that an artery, which, unknown to the surgeon, was not in its usual location, was pricked by the needle. The Court held that, by reason of the surgeon's ignorance of the misplaced artery, the injury was effected through accidental means, saying:

"The thing that was unexpected and unusual in this instance was the perhaps congenital misplacement of

an artery. We think this element of the act of sewing up the surgeon's cut was, within the definition, as truly accidental as would have been the case had the surgeon's needle broken."

Third Circuit. Maryland etc. v. Spitz, 246 Fed. 817. A butcher had died from infection caused by scratching a scab with bloody hands. A recovery was denied but only because the infection "was a probable result, one to be reasonably expected" from the intentional act.

Fourth Circuit. Mutual Life Insurance Co. v. Dodge, 11 Fed. (2) 486. Novocaine was administered to Dodge who, unknown to himself or the surgeon, happened to have a supersensibility to this ordinarily harmless drug. The Court said:

"In the act which preceded the death of the insured there 'was something unforeseen, unexpected and unusual' to use the expression of Justice Blatchford, viz., the application of the novocaine to one who had an "idiosyncrasy' or 'hypersensibility' to the drug. It is true that the doctor intended to apply the drug and the insured intended that he should apply it; but neither intended to apply it to a body possessed of the idiosyncrasy."

Fifth Circuit. State Life Insurance Co. v. Allison, 269 Fed. 93. Insured was a soldier and was killed in battle. The Court said:

"Of the millions of Americans who served as soldiers in the war with Germany comparatively few were wounded or killed in battle. * * * Whether the injury or death of a particular soldier is a consequence of his participation in a battle ordinarily depends on his happening to be or not to be in the path of a missile of war. It cannot be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his being so exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents."

The rules of law applied in the present case are in irreconcilable conflict with the cases cited from other circuits.

II.

THE DECREE BELOW IS ERRONEOUS.

The conflicting cases to which we have referred have resulted from differing interpretations of Mutual Accident Association v. Barry, 131 U. S. 100, decided in 1885, and ever since accepted as authority in state as well as federal courts.

If the court below has correctly interpreted that case, its judgment should be affirmed. But if the other courts to which we have referred have correctly interpreted it, the judgment must be reversed.

In the Barry case the question was whether the insured's death resulted from injuries effected through accidental means. Barry, a physician 30 years of age and in robust health, in company with two of his colleagues, jumped from a platform four or five feet from the ground. The other two jumped first and alighted safely, but Barry suffered a stricture of the duodenum and died.

No one saw him when he jumped or when he landed or in the interval between jumping and landing. The only evidence throwing any light on the precise cause of the injuries was the testimony of his companions that the sound made when he came in contact with the ground attracted their attention and caused them to inquire whether he was hurt; that, from this sound, it seemed to them that he "came down solid on his heels," instead of striking first on his toes and bending his knees so as to break the shock.

From these facts it appeared, of course, that the act of jumping was intentional. If the injury was one reasonably to be expected in the usual course of things, there was no accident and no case for the jury. The only evidence bearing on this question was the fact that two men had just made the same jump and alighted without injury.

From the testimony of the insured's companions, it might be inferred that the injury resulted from the manner in which the landing was made. And another fair inference from the same evidence was that the manner in which the landing was made was one from which injury

was reasonably to be expected. If this was the case and he landed in the way he intended, with knowledge of the danger, there was still no accident and no case for the jury.

There was no ground upon which a verdict could rest unless the jury was at liberty to say that either (1) he did not intend to land as he did or (2) he did so intend but was ignorant of the danger. And there was no direct evidence as to how he intended to land, or that he was ignorant of the proper way to land. Neither of these facts could be established except by presumptions.

The Court held that (1) "the jumping from the platform was the means by which the injury was caused"; (2) "the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground"; (3) the term "accidental" was used in the policy in its ordinary popular sense, as meaning "happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected"; (4) "if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means," but (5) "if in the act which precedes the injury something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

These were the rules by which this Court tested the con-

tention that there was no evidence to support a verdict for the plaintiff. As we have seen, there was no affirmative evidence that insured did not land exactly as he intended, or of anything that happened between the act of jumping and the landing. There was no evidence to support the verdict unless some accidental intervention was to be presumed from the unusual result. And the Court expressly based its decision on such a presumption, stating its reason for rejecting the contention thus:

> "The two companions jumped from the same platform at the same time and place and alighted safely. It must be presumed not only that he intended to alight safely, but thought that he would. The jury was, on all the evidence, at liberty to say that it was an accident that he did not."

So here, the means by which the injury was caused was the act of the insured in exposing himself to the rays of the sun by playing golf. Playing golf does not, in the usual course of things, result in injury. On the contrary, it is widely recognized as a health-giving recreation. Thousands play it constantly without harm to themselves. On the day of insured's death others played, without injury to themselves, on the same links. It must, therefore, be presumed not only that he intended to play safely, but thought he would. Hence a jury, on proof of the facts alleged, would be at liberty to say that it was an accident that he did not.

The error in the decision below is that it is based entirely on the rule that if an injury follows an intentional act without some intervening accident or involuntary act it is not effected by accidental means, but ignores what we think was expressly decided in the Barry case, that there is ample evidence of such intervention when the injury is one which could not be reasonably expected from the intentional act.

Unless this is the law, accident insurance is a very different thing from what the insured think it is. Men carry accident insurance to protect against mishap in the course of their usual avocations and recreations. The things they do are not ordinarily followed by injury. But there is scarcely an act which one does in the pursuit of his business or his recreations which is not sometimes followed by unexpected and unaccountable injury. It is protection against such unexpected injuries which the man in the street understands he gets when he buys accident insurance. Such insurance is of little value if it does not protect merely because the injury happens to follow an intentional act. And this result, according to the Barry case, is avoided by the very fair presumption that the insured intended only the consequences which ordinarily follow the act; and that, when he does what he did and others are accustomed to do without injury, he intends and expects to do it in safety, and that the unintended and unexpected injury is brought about by chance or mishap, or, as expressly al-

leged in the third count, by ignorance of an existing circumstance or condition which rendered his ordinarily safe act dangerous and thus transformed an intentional into an unintentional and accidental act.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 295.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and TRAVELERS INSURANCE COMPANY,
Respondents.

Consolidated Causes.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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LIST OF AUTHORITIES CITED.

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I.

It will, of course, be conceded that death from the effect of the heat of the sun is not a result which, in the ordinary course of things, is reasonably to be expected from playing golf. And counsel seem to agree that, according to popular understanding, such a death is an **accidental result.** But they say that, nothing else appearing, it can-

not be said that the injury resulting in death was effected through **accidental means or cause.**

II.

The decision below is based squarely on the view that the death resulted from the voluntary act of exposure to the heat of the sun and hence the injury was not effected through **accidental** means. The question was briefly disposed of thus:

> "The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than he intended."

In other words, because insured did only what he intended in the way he intended, it follows that the resulting injury was not brought about by accidental means.

This ignores (1) the rule that when one does an intentional act he is deemed to intend only the consequence which naturally and in ordinary course of things result from such an act, and (2) the fact that death is not one of the things which can reasonably be expected to result from playing golf.

III.

The Court must determine which of two lines of cases has correctly interpreted Accident Association v. Barry, 130 U. S. 100.

There is no disagreement as to the general rules established by that case.

(1) An accident is something unforeseen, unexpected, unusual, happening by chance and not in the ordinary course of things.

(2) That which is the natural, usual and reasonably to be expected result of an intentional act has no element of the accidental in it.

(3) But if in the doing of an intentional act, something unforeseen, unexpected occurs producing an injury which does not ordinarily follow such an act, then the injury has been brought about by accidental means or cause.

There is, we believe, no disagreement as to these propositions. The disagreement is as to what is necessary to show the intervening accidental cause.

IV.

The Court below and some other courts hold, in effect, that the intervening accidental cause cannot be inferred or presumed from the fact that the result of the intentional act is out of all proportion to what was reasonably to be expected from the act. According to them, it is necessary to show, in some affirmative way, just what the intervening cause was. These cases recognize that an unexpected and unintended result may properly be, and usually is, called an accidental result but draw a distinction between

an **accidental result** and a result brought about by **accidental means.** And so, in this case, counsel seem to agree that insured suffered an **accidental death** but insist that the declarations do not show that it was brought about by **accidental means.** This, it seems to us, is a plain contradiction in terms. How is it possible for any **result** to be accidental unless there is an element of the accidental in the **means** by which it is produced? Certainly the distinction is too fine to be perceived by the ordinary policyholder who, giving the language used its ordinary meaning, naturally supposes he is insured against accidental **results.**

V.

The distinction mentioned in the preceding paragraph, as shown by the cases cited in the petition and supporting brief, has been rejected by most of the federal courts. Indulging in no hair-splitting or fine distinctions but construing language as it is ordinarily understood, they hold, in effect:

(1) That when a result is one which does not, in the usual course of things, follow and is not reasonably to be expected to follow, from a given act, it is an **accidental** result.

(2) That every accidental result is necessarily brought about by some accidental means or cause.

(3) That when it appears that a **result** was accidental, it is not necessary to show which of the many

accidental **causes** that might have produced it did actually intervene.

This is the sound and rational construction to be put on policies of this kind. If one intentionally jumps from a tenth-story window, the natural result is death. No inference is possible except that death was intended. If one steps down a distance of one foot, this is an act which is usually performed in safety and from which injury is not reasonably to be expected. Nothing else appearing, the reasonable inference is that he intended and expected to perform the act in safety and that some unexpected and accidental cause intervened to prevent his doing so.

If it can be said that the fact that one jumps from a platform four or five feet high leaves it doubtful whether the resulting injury was one which was reasonably to be expected, the doubt is resolved when it appears that others made the same jump at the same time and place without injury. As said in the Barry case, the presumption or inference is that he intended and expected to land safely, and that he did not was an accident.

We call attention to the reasoning of two federal cases not cited in our original brief in both of which the policies were the same as in this case. They support and emphasize the rule that whether a given result has been brought about by accidental means or cause is to be determined according as such a result is or is not one which ordinarily follows and hence is reasonably to be expected from the intentional act.

Norris v. New York Life, 49 Fed. (2) 62. In this case, the Circuit Court of Appeals for the Fourth Circuit, said:

> "Here the insured interfered in an altercation, evidently for the purpose of dissuading his brother from shooting another. He could not believe, nor would any reasonable man have believed, that his brother would shoot him. When his brother did shoot and kill him, it was within the meaning of the law an accidental cause."

New York Life v. Gustafson, 55 Fed. (2) 236. In this case a professional boxer, while engaged in a boxing match, received a blow on the chin which broke his neck and killed him. The Circuit Court of Appeals for the Second Circuit said:

> "That the man's death resulted from a boxing blow is a fact; that a man enters such a contest knowing that his opponent will inflict the hardest blows possible, that death occasionally comes in a boxing match, all are facts. But that such facts make death in such a match nonaccidental by no means follows, any more than every death in sports—wrestling, fencing, baseball, football—is nonaccidental because of the fact that occasionally happens. Accidental has in it the element of improbable, unusual, by chance."

The stipulated facts disclosed nothing throwing light on the exact cause of the unusual result and the Court did not find it necessary to determine just what that cause was, contenting itself with referring to several things

any one of which might possibly have been, but none of which was shown to have been, the cause of the unexpected death, as follows:

> "The deceased possibly had his chin raised so that his opponent's blow had an increased range and effect of leverage. The position of his opponent might have been at such a lower level that his upward stroke was delivered with telling effect. The particular position of the deceased's chin, and the angle from which his opponent's blow came, might have been such as to make the blow a neck-breaking one, when a slight departure from those angles would have no such effect."

VI.

While there are a number of cases to the contrary, the decided weight of authority in the state courts is that when sunstroke follows a voluntary act which cannot reasonably be expected to produce such a result, it is brought about by accidental means. We will not attempt to review these cases but refer to those collected in the note to Richards v. Standard in 17 L. R. A., page 1183, and especially to the review of the authorities by the New Jersey Court in the very recent case of Lower v. Metropolitan, 168 Atl. 592.

VII.

But, even under the rule invoked by counsel, the demurrers to the third counts should have been overruled.

Those counts alleged that the intervening accidental means or cause was the condition, unknown to the insured, which, for the time being, rendered him supersensitive to the heat of the sun. This makes a case under the sound rule that a voluntary act is an accidental act if performed under conditions which, if known, would have deterred from performance.

VIII.

It is said that sunstroke is a disease. The declarations do not attempt to give a name to the injuries from which insured died. They merely allege that the force of the sun's rays upon his head and body inflicted bodily injuries from which he was overcome and died. But if it was sunstroke and even if it be conceded that sunstroke is a disease, it is certain that he did not have it until it was caused by the force of the sun's rays to which he was exposed by playing golf. It was, in fact, the bodily injury which was effected by accidental means.

It is true that the Phoenix policies expressly except death resulting directly or indirectly, wholly or partly from disease. But the meaning of this language seems to be one thing about which all the authorities are in accord. A disease existing at the time of the accident and not one caused by the accident itself is meant.

If one dies as a result of accidental injuries but it appears that the injuries would not have been fatal but for a disease existing at the time of the accident, then the

disease would be a contributing cause which would bar a recovery. On the other hand, if one who is suffering from a serious disease is killed instantly by being accidentally shot through the heart, it cannot be said that his death has resulted wholly or partly from disease. Again, if one in sound health receives an accidental blow which produces a disease followed by death, that death has resulted, independently of all other causes, from an accidental blow (Ryan v. Continental Casualty Company, 47 Fed. [2] 474; Order of United etc. v. Edwards, 52 Fed. [2] 187; Lower v. Metropolitan Insurance Company, 168 Atl. Rep. 592).

A familiar example is pneumonia. A bodily injury which would not, in the case of a person in good health, be serious might very well be fatal to one already suffering from pneumonia on account of his weakened and diseased condition. In such case, death results at least partly from disease. On the other hand, it is well known that pneumonia may be produced by a blow. A person in perfect health may receive such an accidental blow that he dies of traumatic pneumonia. But, in that case, the disease itself is caused by the blow. Without the blow there would have been no disease. Hence death has resulted solely from the accident.

But sunstroke should not be held to be a disease. There are a few cases, cited by counsel, which have so held. But the great weight of authority is that, while scientifically and for medical purposes, it is sometimes called a disease,

it does not have that meaning in the popular mind. To the ordinary man, and hence in insurance policies, it is like a stroke of lightning, freezing and drowning—an accident. The authorities to this effect are collected in a note to Richards v. Standard in 17 A. L. R. at page 1183. And a later review of the authorities is contained in a strongly reasoned opinion in Lower v. Metropolitan, 168 Atl. 592.

IX.

It happens that the recent case of Lower v. Metropolitan decided by the Court of Errors and Appeals of New Jersey, and published in 168 Atl. Rep., p. 592, which was a sunstroke case, decides every question involved in this case. With its strong reasoning and citation of authorities, it supports every proposition for which we contend as follows:

(1) The means by which the injuries resulting in death were effected was the act of the insured in playing golf.

(2) Death resulted from injuries caused by the heat and force of the sun's rays and whether these injuries be called sunstroke or what not, they were bodily injuries.

(3) The injury which the insured suffered was not one which was to be reasonably expected from playing golf in the sun. Hence, it was effected through **accidental** means.

(4) The exception, in the policies, of death resulting

wholly or partly from disease applies only to pre-existing disease and not to disease produced by the accident itself.

(5) Sunstroke is not a disease but is an accident.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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No.....

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CONSOLIDATED CAUSES.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

THE ALLEGED GROUNDS FOR THE WRIT DO NOT EXIST.

Petitioner will be referred to as plaintiff and respondents as defendants, as they stood in the District Court.

A.

Errors in Plaintiff's Statement of the Case.

The language of the Phoenix policies in suit is misquoted in the petition (p. 2) by the omission of a vital word, "solely." The petition states the language in part thus:

> "Directly and independently of all other causes from bodily injuries effected through external, violent and accidental means."

Whereas the correct language, as set out in the declaration (R. 3), is:

> "Directly and independently of all other causes from bodily injuries effected **solely** through external, violent and accidental causes."

The Travelers policy provides for insurance **only** against loss resulting

> "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means,"

and (under further provisions here applicable) **only** in event "such injuries • • • shall result, independently and exclusively of all other causes," in the loss in question. The petition (p. 2) ignores the word "only." All the policies were sent up on the appeal (R. 2). Plaintiff's argument on the merits and references to other decisions sup-

posedly in conflict would be more pertinent in the absence of the requirement that an external, violent and accidental means be the **"sole"** or "only" cause of the injuries. The same erroneous statement by plaintiff in her brief in the Circuit Court of Appeals was pointed out in that court.

Plaintiff fails to mention an important motion and subsequent proceedings thereon with respect to the third count of the declaration which go to the heart of her argument based on the supposed existence of an abnormal condition of the insured's body. Her petition is grounded on the third count as it stood originally in the declaration, and ignores the modification thereof which had occurred before the District Court's ruling from which the appeal was taken. In its original form this count asserted as an allegation of fact (R. 8) that insured was suffering from a "temporary and unknown condition," which (in the language of her petition, p. 18) "transformed an intentional into an unintentional act." Defendants attacked the third count by a motion to make it more specific with reference to this alleged temporary and unknown condition by specifying the nature thereof, etc. (R. 9). The motions were **sustained** and the following proceedings had thereon as set forth in the order of judgment (R. 17):

> "(b) That said motions to make the third count of the declarations more specific be and they are hereby sustained.
>
> "Thereupon plaintiff, by her counsel, **admitted and agreed that she was unable to make the third count**

> **of the declarations more specific in the matter complained of by said motions with respect thereto,** whereupon defendants' motions to amend their motions to make the declaration more specific, by moving to strike the third count, were duly allowed; and said motions to strike were, by consent of all parties, treated as demurrers to the third count, * * * and the Court, on due consideration thereof, **in connection with plaintiff's said admission,** orders that said demurrers be, and they are, hereby in all things sustained."

Note. **No exception** was taken by plaintiff to the ruling of the Court in sustaining said motions (R. 17-18), and no error was assigned with respect thereto (R. 23-24). The effect thereof was:

> (a) A conclusive adjudication that the allegations in question were insufficiently definite and specific to stand as allegations of fact.
>
> (b) A record amendment to the third count of the declaration, as result of which the issues ultimately presented for decision on the demurrer do not include the cause of action stated by that count in its original form. As met by the demurrer the cause of action stated by that count had been modified by the Court's ruling on the motion to make more specific and amended by plaintiff's admission that the allegations in question were in effect made merely as **conclusions.**

The third count, therefore, adds nothing to the cause of action alleged in the other three counts. The assertion as to the insured's "temporary condition," being thus merely

a conclusion from other facts alleged, is not admitted by the demurrer (**Crockett v. McLanahan**, 109 Tenn. 517, 525, 72 S. W. 950; **H. T. Hackney Co. v. Robt. E. Lee Hotel**, 156 Tenn. 243, 252, 300 S. W. 1). To state a cause of action it was necessary for plaintiff to allege facts affirmatively showing the death occurred from accidental causes under conditions specified in the policies. The presumption is that death occurred from natural causes (**Travelers Ins. Co. v. McConkey**, 127 U. S. 661, 32 L. Ed. 308; **Natl. Masonic Assn. v. Shyrock** [C. C. A. 8], 73 Fed. 774; **Westmoreland v. Preferred Acc. Ins. Co.** [C. C. Ga.], 75 Fed. 244). An allegation that an unknown cause co-operated with the usual effect of a known cause adds nothing to the declaration (**Westmoreland v. Preferred Acc. Ins. Co.**, supra).

B.

This Court has Recently Denied Application for Certiorari on the Same Question.

In **Nickman v. N. Y. Life Ins. Co.**, 282 U. S. 855, 75 L. Ed. 757, this Court denied a certiorari application involving a claim on the same policy provisions for death by sunstroke decided by the lower court (39 F. [2d] 763) on substantially the same grounds as here presented. As an allegedly new feature plaintiff has sought to inject the question involved in the "anaesthetic cases," discussed in the petition. The effort failed by reason of plaintiff's inability to make any factual allegations concerning the in-

sured's physical condition. But with or without this question, the petition boils down to the simple issue whether, under the authority of **U. S. Mutual Acc. Asso. v. Barry,** 131 U. S. 100, 33 L. Ed. 60, a mere unexpected and unexplained result of a voluntary act, without any intervening accident, is a result produced by an accidental cause. And that was precisely the issue in the Nickman case.

C.

There Is No Conflict in the Circuits on the Issue Here.

As the District Court observed (R. 20-21), the third count of the declaration "undertakes, by elimination, to state a cause of action" within the principles of "earlier decisions"—namely, **Mutual L. Ins. Co. v. Dodge** (C. C. A. 4), 11 F. (2d) 486, and **Aetna L. Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6. But the effort failed because of plaintiff's inability to make the necessary factual allegations as to the supposed abnormal physical condition of the insured. The Dodge and Brand cases, therefore (assuming them properly decided), are not applicable here, for the reasons, among others, that:

(a) The physical condition in those cases was capable of affirmative proof by direct or circumstantial evidence. But here the supposed temporary supersusceptibility to heat admittedly is based on nothing in the world but the fact that he suffered a sunstroke. This momentary supersusceptibility might have been

caused by one or more of various things he had done, or other circumstances as to which plaintiff admittedly could offer no proof, and none of which could with any reasonable certainty have been inferred with more plausibility than any other one.

(b) In the instant case plaintiff was compelled to allege a temporary abnormal physical condition, i. e., temporary inability to withstand heat, in order to steer her declaration clear of the further clause in the Phoenix policies making the double indemnity nonpayable if death result

> "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease."

(c) The physical condition in the Dodge and Brand cases was of **inherent** nature, resulting from causes over which insured had **no control**. Whereas, the "temporary condition or disorder" alleged in the instant case presumably would result only from some temporary cause over which insured might have control. Thus, the insured might have voluntarily eaten or drunk something that would produce a "temporary condition or disorder" affecting temporarily his ability to withstand intense heat, which condition might be unknown to him, but, nevertheless, since voluntarily produced, would not be accidental. When a child has its first adventure into an orchard of green apples, the resulting stomach ache is produced by a condition in his stomach of which he is ignorant, but it is not accidental.

In other words, among the ultimate features on which the Dodge and Brand cases, even if good law, would fail utterly to sustain the theory here urged are (1) that they involved affirmative evidence of a permanent abnormal physical condition unknown to the insured, while in the present case plaintiff must ask the Court to "presume" a similar temporary condition; and (2) that in those cases the physical condition in question was admittedly not caused by any voluntary act on the part of the insured, while in the present case it very easily might have been, but plaintiff seeks a "presumption" that it was not.

We challenge plaintiff's assertion (Petition, p. 8) that the Circuits "divide on whether an ordinarily harmless act is followed by an injury which, in the ordinary course of things, is not reasonably to be expected, it can, without more, be said that the injury is effected through accidental means." No Circuit Court of Appeals has announced such a doctrine. A man for exercise raises and lowers himself from a chair. The exertion causes heart failure and death. Although this "ordinarily harmless act" is followed by "an injury which, in the ordinary course of things is not reasonably to be expected," the injury is not effected through accidental means (**Hastings v. Travelers Ins. Co.** [C. C.—Wash.], 190 Fed. 258). No Circuit Court of Appeals has decided or indicated it would decide this question differently. Yet it is a perfect test case of the question on which plaintiff asserts the Circuits are in

sharp conflict. There is a theory adopted by a few state courts, known as the theory of "accidental result," as distinguished from that of "result from accidental cause." This will be discussed later, but the important point here is that no Circuit Court of Appeals, so far as we can find, has ever adopted it. Contra, the theory of result from accidental cause is not infrequently referred to as the "rule of the Federal Courts" on this subject. Thus, in holding a sunstroke not the result of an accidental cause, a District Court of Pennsylvania in **Paist v. Aetna Life Ins. Co.**, 52 F. (2d) 393, said:

> "'Though there are some irreconcilable decisions, this rule **has been generally accepted by the federal courts**, both in sunstroke cases (Nickman v. N. Y. Life Ins. Co., 39 F. [2d] 767 [C. C. A. 6]) and in other cases involving the general question of accidental means. * * *
>
> "'While I do not think that the bodily reactions which caused and constituted the injuries in this case can be said to have been a natural or probable result of the insured's exposure to the sun's rays, nevertheless the insured's voluntary act was not complicated by any unforeseen, unexpected or unusual occurrence. I therefore conclude that the means effecting the injuries which resulted in the insured's death in this case were not accidental.
>
> "'I am also of the opinion that there is no evidence in this case of a visible contusion or wound upon the exterior of the body. To hold that a flushed, sunburned face is a wound or contusion would be

straining language far beyond any reasonable meaning which could be assigned to it.'?"

(Note: All bold face type ours unless otherwise indicated.)

Above case was affirmed in 60 F. (2d) 476. The Appellate Court elected to rest its decision on the second ground stated by the District Judge, namely, that death from sun stroke was not "evidenced by a visible contusion or wound" within the double indemnity clause. It therefore refrained from passing on the first question.

In **Jensma v. Sun Life Ins. Co.** (C. C. A. 9), 64 F. (2d) 457, relied on by plaintiff, there was an accidental entry of germs **from the outside**, and this was the cause of the bodily injuries which produced death. As the Court said (p. 459), all the evidence pointed **"inescapably to infection from some external means,"** and also a witness heavily relied upon had declared (p. 459), "It was probably introduced from the outside, probably after the infection." Of course, as the opinion concedes (p. 459), if the infection or unknown cause had "come from within the decedent's own body" there could have been no recovery. That case is no authority for the proposition that mere existence of temporary inability of the insured to withstand sun heat is an external, violent or accidental means. The same is true of **Lewis v. Ocean Acc. & G. Corp.**, 224 N. Y. 18, next referred to by plaintiff. There also a germ, the staphylococcus aureus, was accidentally introduced from the outside

into the insured's body. In both of these cases there was actual evidence of an accidental external infection. As stated in the latter (p. 29):

> "The plaintiff's experts say that in their opinion the entrance of the germs from the skin into the deeper tissues was the result of trauma. They say that trauma is almost invariably the cause of such infections. We find the signs of trauma here in the punctured wound which was visible when the physician was first consulted. The insured was an athlete in the prime of life and the fullness of health; **the infection was not due, therefore, to lowered powers of resistance.**"

Whereas, the instant case in this connection is based directly and solely on the insured's alleged temporary "lowered power of resistance" to the heat of the sun.

Of the other cases cited by plaintiff, **Maryland Cas. Co. v. Spitz** (C. C. A. 3), 246 Fed. 817, held the injury in question was not produced by accidental means, and denied recovery. It therefore could not constitute an adverse authority on the point in question. Contra, the law of the Third Circuit is well established to the effect that the mere unexpectedness of a result does not constitute it a result produced by accidental means. Thus, the insured stubbed his toe, which, due to unknown defective condition of his body, was followed by gangrene and in turn by death. Held, there could be no recovery under an accident policy against "bodily injuries effected solely through external,

violent and accidental means, that independently of all other causes result in death or disabilities set forth" (**Maryland Casualty Co. v. Morrow** [C. C. A. 3], 213 Fed. 599). The authority of this case in the Third Circuit has never been questioned.

State L. Ins. Co. v. Allison (C. C. A. 5), 269 Fed. 93, cited by plaintiff, is pertinent neither to the instant case nor to the supposed conflict in the circuits. It involved an admitted external injury which resulted in death, and the question was whether the cause producing such injury was accidental. This cause consisted in the unexpected striking of the insured's head by a piece of shrapnel. The Court held that in view of the small number of persons struck by missiles in comparison with the number engaged in the battle, the striking of any one of them should be regarded as accidental. The point wherein that case differs from the one at bar is that there the striking of insured by the shrapnel was involuntary on his part, and was an act which (the Court thought) he was reasonably entitled to assume probably would not occur, whereas in the instant case the "striking of the sun's rays" on the insured (which plaintiff argues was the necessary bodily injury) was the expected result of the insured's voluntary exposure of himself to the rays of the sun. Stated otherwise, in the instant case the insured knew he would be struck by the sun's rays, whereas in the Allison case it was fair to assume that, while he might be, the chances were

he would not be struck by the missile. In battle many are shot at, comparatively few are hit.

Concluding this subject, we submit the Circuit Courts of Appeal are not in conflict on the question—decisive of plaintiff's case—whether the cause or means, as distinguished from the result, must be accidental.

II.

THE CASE WAS CORRECTLY DECIDED BY THE LOWER COURTS.

A.

There Was No Accidental Cause.

Plaintiff's argument on the merits is based on an analysis of **U. S. Mutual Acc. Asso. v. Barry**, supra, which is devoted to an effort to eliminate from the decision the very point on which it actually turned, namely, the slip or mishap occurring in the course of insured's act of jumping. Thus, in concluding the analysis the petition states (p. 16):

> "As we have seen, there was no affirmative evidence that insured did not land exactly as he intended, or of anything that happened between the act of jumping and the landing."

Contrast this with the Court's charge to the jury (p. 109):

> "'here is the precise point on which the question

turns: Was there or not any unexpected or unforeseen or involuntary **movement of the body** from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any **involuntary turning of the body** in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

"'And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. (But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or **involuntary movement**, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or ex-

pected, and injury thereby resulted, then the injury would be attributable to accidental means.)' "

The trial court thus charged (and this Court approved) that the question was not whether the result was unexpected, but whether there was something unexpected in the **cause**, i. e., the manner of the jump.

The decision, we submit, was correctly analyzed in **Pope v. Prudential Ins. Co. of America** (C. C. A. 6), 29 F. (2d) 544, wherein Judge Denison said (p. 186):

> "In U. S. Mutual Ass'n v. Barry, 131 U. S. 100-121, 9 S. Ct. 755, 33 L. Ed. 60, the Court had to consider whether there was evidence to support a finding that the injury had been caused by accidental means, and to review the definitions given by the trial court. The evidence recited, what the Court had said in its charge to the jury, and the comments of the Supreme Court, all indicate that the approved theory of recovery was that there had been some slip or mishap attending Barry's act in jumping to the ground, whereby his intended act was, as to the manner of its execution; transformed into an unintended one. To make the case parallel to the present one, it would have to be assumed that the surgeon in this case, in bringing the kidney up to an accessible point, **had some slip or mishap, and exerted the lifting force with some sudden jerk which was accidental.**"

Plaintiff's brief in the Circuit Court of Appeals approved the interpretation which the Pope case placed on

the Barry case, and asserted it was in accord with "practically all reported cases from other circuits in which recoveries have either been allowed or denied."

In **Caldwell v. Travelers Ins. Co.**, 305 Mo. 619, 267 S. W. 907, 39 A. L. R. 56, after considering at length the Barry case, the opinion proceeds (pp. 72-73):

> "I am unable to understand how the language used in the instruction to the jury, given by the trial court and approved by the Supreme Court of the United States, can be construed as lending any support to the doctrine that, where the injury is the unexpected result of an intentional act, it is caused by accidental means."
>
> • • • •
>
> (pp. 79-80) "As above indicated, the rule that injury or death is produced by accidental means when the **result** is unusual, unexpected, or unforeseen seems largely to be built upon a **misconception** of the case of United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. Ed. 60, 9 Sup. Ct. Rep. 755, above discussed. That case clearly lays down the rule contended for by defendant in the case at bar. In discussing 'accidental means' Mr. Justice Blatchford most correctly said that the jumping off the platform was the means causing the injury, and that the question submitted to the jury was whether there occurred anything accidental, unforeseen, involuntary or unexpected in such act of jumping—that is, in the means which produced the injury—from the time deceased left the platform until he alighted upon the ground. That which occurred when Dr. Barry alighted upon the

ground was clearly the result. **It was not enough that the result was unexpected, unforeseen or out of the ordinary.** The learned Justice then laid down the proposition, which seems to me is decisive of this case and fully sustains defendant's contention here, 'that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means.' Could language be plainer? The words 'in a not unusual or unexpected way' plainly modified the verb 'employed,' and not the preceding verb 'follows.' If the language could possibly be made plainer it would be by saying that, where the means which causes the injury was voluntarily employed in the usual and expected way, the resulting injury is not produced by accidental means, even though such resulting injury is entirely unusual, unexpected and unforeseen."

From plaintiff's statement of the Barry case (Petition, pp. 14, 15) it would appear the controlling questions were whether the manner of landing "was one from which injury was reasonably to be expected," and whether the insured "was ignorant of the danger," or "ignorant of the proper way to land." The opinion makes no reference to any such questions. The issue submitted to the jury (and approved by this Court) was whether some unintentional slip, twist or turn caused the insured to alight,

from a physical standpoint, otherwise than as he intended. As the trial court said (p. 110): "Of course, it is to be presumed that he expected to reach the ground safely." There was no question for the jury as to that. The question submitted was as to an unexpected physical act, a slip, twist or turn; not as to a mental conception as to safety or danger from alighting in the manner he intended. Contrary to the implication in the petition (p. 15) there is absolutely no reference in the case to any presumption regarding the insured's "knowledge or ignorance of the proper way to land." Both the trial and appellate courts in effect stated that, regardless of assured's knowledge of the effect of alighting in any particular manner, there was no accident in the jump if he landed physically as he intended to. The petition asserts (p. 15):

> "There was no ground upon which a verdict could rest unless the jury was at liberty to say that either (1) he did not intend to land as he did or (2) he did so intend, but was ignorant of the danger."

Aside from reasons just indicated this is erroneous, because:

(a) The jury was instructed to consider the ultimate issue "in the light of all proven facts" (p. 108).

(b) An approved instruction was that "The jumping off the platform was the **means** by which the injury, if

any, was caused" (p. 109). This necessarily negatived any inference that such means could consist in the insured's intention, knowledge or ignorance.

(c) Another approved instruction was that:

> "Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not as expected, happen, in the **act of jumping or striking the ground**, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means" (p. 110).

(d) There was no testimony as to whether he "was ignorant of the danger." The complaint (pp. 101-102) contained no allegation or predicate for such testimony.

This brings us to the epitome of plaintiff's argument as founded on the Barry case (Petition, p. 17):

> "The error in the decision below is that it is based entirely on the rule that if an injury follows intentional act without some intervening accident or involuntary act it is not effected by accidental means, but ignores what we think was expressly decided in the Barry case, that there is ample evidence of such intervention when the injury is one which could not be reasonably expected from the intentional act."

The Barry case held that the jury could find an accident in the jump, not as a legal presumption from the

mere fact that the insured's duodenum was ruptured (i. e., the "accidental result"), without further explanation, but as an inference of fact from the physical manner of landing. Whereas, in the case at bar there was no factual showing as to the "intervening accident or involuntary act," but merely the showing of the unexpected result, from which plaintiff seeks a legal presumption that there was "such intervention." Plaintiff's contention by implication concedes there must be an "intervening accident" and that she cannot rest alone on a mere unexpected result, but urges the necessary intervening accident may be "presumed," without more, from the unexpected result. Plaintiff reasons as follows:

(a) The very occurrence of an unexplained injury raises a **presumption** that there was some slip, mishap or ignorance of a material factor.

(b) Therefore, the very occurrence of an unexplained injury raises a presumption that transforms the intentional act into an accidental cause.

(c) Therefore, the very occurrence of an unexpected and unexplained injury raises a presumption that it resulted from an accidental cause.

Thus, by the injection of the "presumption," plaintiff arrives at a conclusion that is in direct conflict with the correct theory of result from accidental cause. In effect, she proves that an "accidental result" is the result of an

accidental cause because there is a presumption that it is. This is what plaintiff in her petition (p. 17) refers to as

> "the very fair presumption that * * * when he (the insured) does what he did and others are accustomed to do without injury, he intends and expects to do it in safety, and that the unintended and unexpected injury is brought about by chance or mishap, or * * * by ignorance of an existing circumstance or condition," etc.

B.

The Supposed Accidental Cause (Inability to Withstand Heat) Was Neither External Nor Violent.

The policies provide there shall be no liability unless the death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes. The **external** causes were the insured's voluntarily subjecting himself to the heat of the sun and his physical exertions incident to playing golf under external circumstances known to him. Nothing was done or occurred, except his resulting illness and death, that was not planned and foreseen by him. While doing exactly what he intended to do, in the exact manner in which he intended to do it, he simply exposed himself to the heat longer than his body could endure. But such exposure and exertion were not, either as to their duration or intensity, or otherwise, caused by any

mishap or unexpected event. While we may assume these were "violent" they were not accidental. And, on the other hand, the alleged **internal** cause, the insured's "temporary condition," sought to be inferred from the mere happening of the death, **was neither external nor violent.**

As stated by the Circuit Court of Appeals herein (R. 30):

> "Finally, if we could construe the third counts of the declarations as averring that the hypersusceptibility of the insured's body to excessive temperature was the accidental cause of his death, we are still confronted with the proposition that such was not the independent cause of death or independent means through which it was effected (Hesse v. Travelers Ins. Co., 299 Pa. 125, 129, 149 A. 96). Nor was it a violent and external cause or means in the sense of the indemnity provisions of the policies. (See Order of United Commercial Travelers v. Shane, supra.)"

And in this connection we beg to refer to the opinion of Judge Taylor in the District Court (R. 22):

> "If as to the third count of the declaration it may be said that there was existing within the insured's body and unknown to him some disorder or condition short of mental or physical infirmity which caused the rays of the sun or the applied heat to produce a different result from that in the case of others, under otherwise identical conditions, such condition was not accidental because unknown. It was a means, in that view, neither accidental, external nor violent. The

Barry case has no such import. The means or cause leading to the result determine the question of liability. That the result was unexpected, unusual or unintended creates no basis for conclusion that a means or cause thereof was accidental, even if unknown. Hypersusceptibility, or more than usual sensitiveness to an external application of force, is not accidental means."

In **Order etc. v. Shane** (C. C. A. 8), 64 F. (2d) 55, the Court, after declaring that the idiosyncrasy of the insured with respect to butyn, administration of which caused his death, was not an "accidental means," proceeded (p. 59):

"Furthermore, in such case the idiosyncrasy would not be either a violent or an external means."

The point is well stated in **Hesse v. Travelers Ins. Co.**, 299 Pa. 125, 149 Atl. 96, wherein the insured died in an operation because of his hypersusceptibility to the anaesthetic. After pointing out that the operation was performed just as intended, the Court said (p. 97):

"Even if we assume that the operation was a bodily injury within the meaning of the policy, we have it admitted that the insured's death did not result from the operation, but solely from the anaesthetic, neither the administration nor the effect of which could possibly be * * * a bodily injury 'through * * * accidental **means.**' There were no accidental means; all those employed were inten-

tional. Nor, if appellant could escape this fact, would she be greatly helped, for decedent's 'bodily injuries (were not) effected directly and **independently** of all other causes' through such means. On the contrary, admittedly the effective cause was his hypersusceptibility to the particular anaesthetic. Defendant did not insure against a loss resulting from such a cause; yet admittedly it was at least a contributing cause of the death, which did not result **'independently'** of it, and this alone is sufficient to exclude liability under the policy." (Emphasis the Court's.)

Similarly, in **Seipel v. Equitable Life Ins. Co. of Iowa** (C. C. A. 7), 59 F. (2d) 544, the insured, an experienced mechanic, and another were lifting in place a truck wheel when insured sustained an umbilical hernia from which he died. In the language of the present plaintiff's declarations and arguments, the act there intentionally performed, as shown in the opinion, was "not one which often results in injury," and "it appears that it is an act which insured and others were accustomed to perform without injury, and which others did perform in safety at the same time and place." But instead of **presuming** "the intervention of either an involuntary act or some unknown circumstance or condition," the Court declared (p. 545):

"If the means which alone caused the hernia were means which Seipel himself intentionally invoked and employed, then the means were not accidental,

> **however unintended and unexpected the result.** In other words, if Seipel intentionally participated in lifting this wheel into position, and while so lifting or holding it the hernia occurred, without the intervention of **outside** and accidental means causing it, his injury was not caused in such manner as to raise liability for the double indemnity (citing cases). * * *
>
> "That he had never before sustained a hernia, **although frequently doing such work**, does not tend to raise any inference against its occurrence this time without the interposition of external, violent and accidental means. We are of opinion that the evidence falls short of **sustaining appellant's burden** of showing that means other than those which deceased intentionally employed were the efficient cause of his injury."

A concise analysis of the policy provisions in issue is found in **Lincoln Nat. L. Ins. Co. v. Erickson** (C. C. A. 8), 42 F. (2d) 997, 1000:

> "An analysis of the provision above quoted from the policy shows that it covers a death caused by bodily injury. The bodily injury must be one effected in a particular way, namely, directly through external means, and directly through violent means, and directly through accidental means. The bodily injury must be the exclusive cause of death independently of all other causes."

That the internal condition of the insured cannot constitute nor contribute to the "violent" or "external" cause

is illustrated in **Smith v. Travelers Ins. Co.**, 219 Mass. 147, 106 N. E. 607, L. R. A. 1916 B 872, holding a similar policy provision did not cover death from meningitis resulting from a violent snuffing of a nasal douche which caused an infection to pass from the outer nose into the brain through a hole in the mastoid bone. The "unusual condition" there present is thus indicated in the opinion:

> "That there should be a hole or perforation in the mastoid bone through which pus or germs could pass from the ear into the brain is a very rare occurrence, in only one out of about 1,000 skulls."

The Court said:

> "But there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some **internal** consequences which he had not foreseen. Accordingly there was no bodily injury effected **through a means which was both external and accidental.** But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have

been an accidental result of the external cause, but that cause itself must have been, **not only external and violent, but also accidental.**"

This is the law in Tennessee, where the insured lived, and these policies were delivered. In **Stone v. Fid. & Cas. Co.**, 133 Tenn. 672, 182 S. W. 252, L. R. A. 1916 536, plaintiff reached above his head to get a newspaper, causing a blood rupture to the retina of the eye, due to the effect of a purgative he had taken. Sustaining a demurrer to his declaration on an accident policy, the Court said (pp. 678-679):

"The weakened condition due to the purgative was not accidental, nor was the excessive blood pressure, both being physical conditions produced from natural causes. The movement of the hand suddenly to get the paper was executed exactly as intended. It was a simple and ordinary movement. The rushing of the blood with excessive pressure, rupturing the retina, was therefore caused by natural means. While the result was not foreseen, the causes producing that result were not accidental."

Pages 675-676:

"**A person may do certain acts, the result of which produces unforeseen consequences, resulting** in what is termed an **accident**; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended.

> "Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. **It is not sufficient that the injury be unusual and unexpected**, but the cause itself must have been unexpected and accidental."

To the same effect is **Ramsey v. Fid. & Cas. Co.**, 143 Tenn. 42, 223 S. W. 341, denying recovery for death unexpectedly resulting from the pulling of a tooth. The temporary weakened condition of the insured in the Stone case, supra, was precisely the sort of "temporary abnormal condition" which plaintiff herein sought to set up in the third count of the declaration. And that case holds such a condition **within** the insured is not an "intervening accident" which (as plaintiff contends) transforms his voluntary act into an involuntary one. In fact, there is not one man in a thousand who has not some "abnormal condition" within his body which may yield an unexpected result to his intentional physical actions. The insuring clauses in question do not purport to insure against abnormal physical condition, chronic or temporary, of the insured, nor against his ignorance of such physical condition. If he desires such coverage he should procure insurance against disability or death from disease. If a man walking up the street collapses from heart failure, while it is a most unexpected consequence of his walk, there is nothing accidental about the cause of it that is external or violent.

C.

The Sunstroke Cases.

(1) **No accident where exposure voluntary.**

In so far as the rays of the sun are regarded as the cause of the injury or death, the obvious answer is that the insured, with full knowledge of their presence, voluntarily subjected himself to their effect. As said in the Nickman case, supra (38 F. [2d] 764-765):

> "Nothing occurred at any time to cause the insured to be involuntarily exposed. He went exactly when, where and as he intended to go throughout the day. He did just as he intended to do. He was exposed by no mishap or misadventure, as in Elsey v. Fid. & Cas. Co. * * * Here nothing affected the insured's power to will, to choose, or to direct his movements. There was nothing accidental in walking the streets, standing near the hot kettle, climbing the ladder or standing upon the roof. These were all intentional acts. He did not, of course, intend to be stricken, and his death was therefore unexpected, but it was not caused by accidental means."

In **Elsey v. Fid. & Cas. Co.**, 187 Ind. 447, L. R. A. 1918 F 646, and several others referred to in above opinion, the Court points out that the exposure itself was involuntary, which distinguishes them from the case at bar. In the cases distinguished the exposure was accidental, while in the case at bar the exposure was intentional. The correct

rule, as expounded and applied in the Nickman case, may be stated thus:

A sunstroke can be considered to be effected by accidental means only where it appears that some accidental event has occurred, and, as a result thereof, the insured been exposed to the heat in a way not intended.

In addition to **Paist v. Aetna Life Ins. Co.**, supra, the following, among others, specifically hold that death by sunstroke from voluntary exposure is not caused by accidental means:

Harloe v. California State Life Ins. Co., ... Cal. ..., 273 Pac. 560;
Semancik v. Continental Casualty Co., 56 Pa. Super. Ct. 392;
Continental Casualty Co. v. Pittman, 145 Ga. 641.

(2) **Is sunstroke a boldily injury as distinguished from a disease?**

We have assumed for argument that sunstroke is a bodily injury; but do not concede this. The demurrers urge that in no event could there be recovery herein for the reason that the effect on the insured's body produced by the excessive heat, popularly called "sunstroke," is not a "bodily injury," but is a disease. The trial court in the Nickman case based its decision on this ground. The Circuit Court of Appeals said (p. 764):

"There is much controversy over whether sunstroke is a disease, or is to be classed as a bodily injury. • • • We do not deem it necessary to decide that point."

In the case at bar the District Court, while considering the weight of authority against defendants on the point, likewise did not deem it necessary to decide it (R. 20). The Circuit Court of Appeals ignored it. For a discussion of this subject we beg to quote from a paper by Mr. Neil P. Beall of Cleveland, Ohio (Proceedings, International Claims Association, Twentieth Annual Convention, p. 73):

"Putting aside the technical definitions of the medical literature and resorting to the general encyclopedias, we find:

" '**Sunstroke** (Heat Stroke; Insolation; Thermic Fever; Siriasis), a term applied to the effects produced upon the ventral nervous system, and through it upon the other organs of the body, by exposure to the sun or to overheated air. Although most frequently observed in tropical regions, this disease occurs also in temperate climates in hot weather.'

Encyclopedia Britannica (11th Ed.), Vol. 26. page 110.

" '**Sunstroke**, prostration due to exposure to intense external heat. Such exposure may be to a direct or indirect rays of a tropical sun or to the excessive heat of an engine room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere

is one of the most important features, since this hinders free evaporation of fluid from the body, which is one of the most important devices for cooling the body. Sunstroke is an old disease. Osler mentions that two instances are on record in the Bible and many of the ancients described it very well, confounding the severer forms with apoplexy.'

The Americana, Vol. 26, page 38.

" '**Sunstroke**, or Thermic Fever, and fever due to the effect of excessive heat or of exposure to the direct heat of the sun, on the nervous centers at the base of the brain.'

Appleton's New Practical Cyclopedia, Vol. 6, page 123.

" '**Sunstroke**, a term applied to two different ailments resulting from the overheating of the body; heat stroke or heat fever and heat exhaustion or heat prostration.'

The American Educator, Vol. 7, page 3473.

" '**Sunstroke.** This term has been applied to two different ailments resulting from overheating of the body.'

The World Book, Vol. 9, page 5630.

"The leading case judicially determined that sunstroke is a disease is an English case, **Sinclair v. Maritime Passenger Assurance Company**, 3 El. & El. 478, decided in 1861. In that case the insured was the master of a vessel and died from sunstroke on the southwestern coast of India. He was insured against

injury from, or by reason of, or in consequence of any accident. The Court denied recovery. The Court said:

" 'Disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although, if being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes.

" 'In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less

liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected, and so died.

" 'We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from "accident" within the meaning of this policy. There must be judgment for the defendants.'

"The question has been presented to the federal courts in the case of **Dozier v. Fidelity & Casualty Company**, 46 Fed. 446, decided by the Circuit Court of Missouri in 1891. The headnote of that case is as follows:

" 'Sunstroke or heat prostration' contracted by the decedent in the course of his ordinary duty as a supervising architect, is a disease, and does not come within the terms of a policy of insurance against bodily injuries, sustained through external, violent and accidental means, but expressly excepting 'any disease or bodily infirmity.'

"On page 448 the Court properly says:

" 'With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, smallpox or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it, certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance.'

"The following quotations show that other federal courts regard sunstroke as a disease:

"'If death was caused by a disease, without any bodily injury inflicted by external, violent and accidental means, as in the case of malignant pustule (Bacon v. Assn., 123 N. Y. 304) and as in the case of sunstroke (Sinclair v. Assurance Company, 3 L. & El. 478; Dozier v. Casualty Company, 46 Fed. 448), the association was free from liability by the express terms of the certificate.'

"**Western Commercial Travelers Assn. v. Smith**, 85 Fed. 401, 404.

"'This leaves only hydrophobia and sunstroke to be accounted for, which it must be confessed are diseases pure and simple, and as to which the point may therefore seem to be well made.' **Herdic v. Maryland Casualty Company**, 146 Fed. 396-8, affirmed 149 Fed. 198.

"The weight of reasoning, therefore, if not the weight of authority, indicates that sunstroke is a disease and not a bodily injury."

These authorities establish that as a legal proposition sunstroke is a disease in the nature of a brain fever produced by exposure to excessive heat, in the same sense that pneumonia is a disease engendered by exposure to cold, and in the same sense that many other maladies and ills to which human flesh is heir, occasioned more or less directly by exposure to the vicissitudes of climate or atmosphere, are diseases. The anatomical lesions brought about by exposure to excessive heat are pathological rather than traumatic. There is no element of bodily injury.

In which case, under the language of these policies, the insurance does not apply.

For the reasons hereinabove set forth we believe the petition should be denied.

Respectfuly submitted,

VAUGHN MILLER,
Attorney for Phoenix Mutual Life Insurance Company.

J. F. FINLAY,
Attorney for Travelers Insurance Company.

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No. 295.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

RESPONDENTS' REPLY BRIEF AFTER CERTIORARI GRANTED.

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I.

Plaintiff's Theory of "Accidental Result" as Contrasted With Result From "External, Violent and Accidental Causes."

Plaintiff's supplemental brief predicates claim for recovery (except as to the third counts) on the bare proposition that the happening of an accidental result, without more, makes a case. The brief inquires (p. 4):

> "How is it possible for any **result** to be accidental unless there is an element of the accidental in the **means** by which it is produced? * * *"

But the policy requirements are not satisfied with merely "an element of the accidental in the means." There must be bodily injuries **effected solely** by external, violent and accidental means or causes.

Stated otherwise, defendants did not insure against "accidental result," or "accidental death." The insurance in question was of a more restricted form, to wit, insurance against death resulting directly and independently of all other causes, from bodily injuries effected solely by external, violent and accidental causes. Coverage as to "accidental death" or "accidental injuries" is found in many statutes regulating workmen's compensation and in some forms of accident insurance, but it is not provided by the policies in suit. In renewed effort for support from the Barry case for the contention that the result is the criterion, plaintiff's supplemental brief asserts that (p. 5):

> "As said in the Barry case, the presumption or inference is that he intended and expected to land safely, and that he did not was an accident."

We find in the Barry case no such statement containing the words following the last comma in the above sentence. No presumption was indulged from the mere fact of the failure to alight safely. What the Court said, after referring to Barry's intention to do so, was this (131 U. S. p. 121):

"The jury were, **on all the evidence**, at liberty to say that it was an accident that he did not. The Court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; * * * that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

The words "in a not unusual or unexpected way" (in the first statement of the rule) plainly modify the verb "employed" and not the preceding verb "follows" (**Caldwell v. Travelers Ins. Co.**, 305 Mo. 619, 39 A. L. R. 56). Therefore, if the act is voluntary and is executed in the **manner planned** it is not accidental however unexpected the **result** of that act may be.

The words "something unforeseen, unexpected, unusual" (in the second statement of the rule) conversely require that the **execution** of the act must be interfered with by some **unintended slip** or **mishap** before it can be called an "accidental cause."

If this Court's language could be made clearer, it would be by saying that if the intentional act is done in the usual

and expected way, the resulting injury is not effected through accidental means, even though such injury is entirely unusual and unexpected when viewed as a **result** of the means employed and the manner in which they were executed (Caldwell case, supra).

Plaintiff's contrary construction of the Barry case is in effect that proof merely of an unexpected result is ipso facto conclusive proof that such result was caused by external, violent and accidental means. We find no decision of a federal court to such effect. But there are decisions without number to the contrary. A list of the more important, with descriptive notes, is attached in an appendix hereto.

The two cases urged in plaintiff's supplemental brief as supporting her contention in this connection are **Norris v. N. Y. Life Ins. Co.** (C. C. A. 4), 49 F. (2d) 62, and **N. Y. Life Ins. Co. v. Gustafson** (C. C. A. 2), 55 F. (2d) 236.

In the Norris case the insured was unexpectedly shot and killed. And it was the **cause**, as distinguished from the result, that was considered and on affirmative proof found to have been accidental, since the shooting was entirely unexpected and unforeseeable. As stated in the portion of the opinion quoted by petitioner:

> "When his brother did shoot and kill him, it was within the meaning of the law an accidental **cause.**"

The cause (unexpected shooting) was not inferred from the resulting bodily injury, but was established by proof.

In the Gustafson case there was affirmative proof by stipulation that the insured, in all respects physically normal and fit for boxing, was killed in a friendly boxing match by a violent blow on his chin which broke his neck. The Court considered that a blow of such nature, received under such circumstances, was quite unforeseeable and unlikely to happen, hence accidental. But it further considered, in accordance with the stipulation, that it was only the force of the blow, with other external factors, which caused the injury. There was no suggestion that any of the causes contributing to the injury were not both external and violent. In fact, the existence of any internal or nonviolent cause, or mere condition of the body, was expressly negatived by the stipulated facts. Quoting from the opinion (p. 237):

> "The stipulated case further is that Gustafson 'was in perfect health, enjoyed exceptional strength and bodily vigor, and was in a trained and fit physical condition to engage successfully as a boxer in a boxing match.' That his death resulted, in the words of the policy, 'from bodily injury,' and that, in the further words of the policy, such injury was effected 'solely through external, violent * * * cause,' is equally clear. Therefore, the crucial question is: Was 'such bodily injury * * * effected through accidental cause'?"

Whereas in the cases at bar not only is there no allegation in the declarations that Landress on the day in question was physically normal, but the declarations expressly

allege (third counts) that he was abnormal and that his abnormal condition was one cause of his injury.

A blow on the chin is an "act," something that "happens" or "occurs" (in the language of the Barry case), which may be contrasted with an abnormality within one's body, which simply exists. The former may be an accident; the latter can be only a condition.

Reference has been made to the many cases (see appendix) of unexpected results from intentional acts, where the only "accidental" feature was internal, and recovery has been denied. We shall now discuss a few of those not mentioned in our earlier brief.

In **Carswell v. Railway Mail Asso.** (C. C. A. 5), 8 F. (2d) 612, the insured suffered acute dilation of the heart from exertion in cranking an automobile. There was no slip or involuntary movement in the act. The Court held that however unexpected or unintended the **result** may have been, it was not caused by "accidental **means**," saying (p. 612):

> "Where one voluntarily undergoes physical exertion, and nothing unexpected or unintended happens while he is doing so, the fact that such exertion unintentionally and unexpectedly causes injury does not make the **means** whereby such injury is caused, namely, the voluntary exertion, **accidental**. The physical injury caused by voluntary exertion or strain, which is unaccompanied by anything which is involuntary, unforeseen, and unusual, is not a result of 'ex-

ternal, violent and accidental means,' within the meaning of the instrument sued on."

In **New Amsterdam Casualty Co. v. Johnson**, 91 Ohio St. 155, 110 N. E. 475, insured, heated from horseback riding, took a cold bath, as he frequently did under similar conditions, but in the instance in question the bath unexpectedly caused a heart dilation and resulted in disability. It was held that since he took the bath voluntarily, to cool off, without slip or fall, with the water of the intended temperature, the unusual result was not occasioned by "accidental means."

The distinction in question was clearly set forth in **Rock v. Travelers Ins. Co.**, 172 Cal. 462, 156 Pac. 1029, where the insured, carrying a casket down a flight of stairs, died as result of a dilation of his heart from the strain. The Court said (p. 465):

"The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death. Policies like the one before us have been before the courts in many cases, and the great weight of authority, we think, sustains the view which we have just expressed."

In **Lehman v. Great Western Acc. Ass'n.**, 155 Iowa 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562, the policy insured "against the effects of personal injury caused solely by external, violent and accidental means," and the question was whether appendicitis due to the irregular condition of the muscles of the side because of their strain in bowling arose from accidental means within the terms of the policy. Denying recovery, the Court said:

> "The act of bowling in itself was not an accidental means, for it was voluntary. The act in itself did not cause the appendicitis. There is no evidence tending to show that **without the intervening accidental result of swollen and strained muscles**, causing friction of the appendix by their irregular action, the disability complained of could have resulted. The accidental means, therefore, causing the disability was **not** the **external and violent** act of bowling, but the **internal condition of swollen and strained muscles.** * * * Finally, it is to be borne in mind that in this case there is no evidence whatever of any slipping or falling, or of any straining of the muscles, other than the intentional strain put upon them in the voluntary and intentional act of bowling. Such a strain was not an accidental strain, and, if it produced an unintentional result and consequent injury, nevertheless the resulting injury, and not the means producing it, was accidental."

In **Kendall v. Travelers' Protective Assn.**, 87 Ore. 179, 169 Pac. 751, under a similar accident certificate, recovery was denied for unexpected infection following the inten-

tional pulling of a hair from the insured's chin. The Court said (p. 190):

> "We note that the defendant does not insure merely against injuries although they might constitute an unexpected effect. The damage, whether anticipated or not as a result, must have happened through accidental, violent and external means. **All three of these ingredients must unite** to form the cause of the subsequent hurt before there can be a recovery."

In **Martin v. Interstate B. M. A. Assn.**, 187 Iowa 869, insured, engaged in sorting marketable and unmarketable oranges, ate three of them and suffered acute indigestion, or gastritis, from which he died. Denying recovery under a certificate covering death "caused by accidental means," the Court said (p. 879):

> "As said before, the defendant died from gastritis, which is caused by the failure of food to properly digest in the stomach. To come within the policy, the injury to the stomach must be traceable to means which were purely accidental, and the disease must be a result of a direct injury to the organ affected thereby, through accidental means. If we were to hold in this case that the plaintiff could recover, then, under a policy containing provisions such as this policy contains, it would follow that, whenever anyone ate food that disagreed with him, or which failed to properly digest, and acute indigestion followed, his beneficiary would be entitled to recover the amount of premium provided in the certificate. This case is clearly

distinguishable from those cases in which the company was held liable where one ate food containing ptomaine poison, without knowledge of the fact that it contained ptomaine poison, and death resulted, not from the failure of the food to digest, but from the effect of the poison."

In **Salinger v. Fid. & Cas. Co. of N. Y.**, 178 Ky. 369, 198 S. W. 1163, under an accident policy with similar provisions, recovery was denied for loss of eyesight caused by a combination of an intentional voluntary act, in placing boxes on a high shelf, and an unknown abnormal condition of insured's eye, a foreign substance in the artery, causing embolus. The Court said (p. 371):

"It may be treated as established by the great weight of authority that an injury is not produced by accidental means within the terms of an accident insurance policy where it is the direct, though unexpected, result of an ordinary act in which the insured intentionally engages. The rule is stated as follows in 1 Corp. Jur., page 426:

"'If a result is such as follows from ordinary means employed voluntarily and in a not unusual or unexpected way, it cannot be called a result effected by accidental means.'

"In Clidero v. Scottish Acc. Ins. Co. (1892), 19 R. 355, 29 Sc. L. Rep. 303, Lord Adam said:

"'A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but

the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental. Now, if that is so, where does the question of accident come in here? There is no evidence that anything unusual or exceptional occurred as to the means or cause of this death. The man was just doing what he meant to do, and apparently a most unfortunate and unexpected result happened—the man's death.' "

In **Shanberg v. F. & Cas. Co.** (C. C. A. 8), 158 Fed. 1, the insured fell dead after carrying a door from one building to another, about three blocks. He had a weak heart, which gave way under the exertion. Denying recovery, the Court said (pp. 4-5):

" 'As we view the case there was no accident in the means through which the bodily injury was effected. It would not help any to call the injury itself—that is, the rupture of the heart—an accident. That was the result, and not the means, through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily, and in an ordinary way, with no unforeseen, accidental, or involuntary movements of the body whatever. There was no stumbling, slipping, or falling; there was nothing accidental in his movements any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not

purport to be a contract of indemnity against death or injury by all means. The cause of death must in all cases, where it is sought to recover under the provisions above quoted, result directly, and independently of all other causes, from bodily injury sustained through external, violent, and accidental means, or the event is without the scope of the contract.' "

So, following the reasoning in the above opinion, it will not help to call the resultant illness and death of Landress an accident. That is not the means which effected the injury. The means which effected the injury that resulted was the exposure to the sun, which was not accidental.

And this distinction is clearly applicable to the "anaesthetic death" cases (**Order etc. v. Shane** [C. C. A. 8], 64 F. [2d] 55, and **Hesse v. Travelers Ins. Co.**, 299 Pa. 125, discussed in our original brief).

Mutual Life Ins. Co. v. Dodge (C. C. A. 4), 11 F. (2d) 486, and **Aetna Life Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6, appear to be in conflict with what we maintain is the correct rule. The Dodge case, as well as the dictum from **Jensma v. Sun Life Ins. Co.** (C. C. A. 9), 64 F. (2d) 457, relied on in the petition and supporting brief, is based largely on a dictum in **Western Com. Trav. Assn. v. Smith** (C. C. A. 8), 85 Fed. 401. The illusory nature of that dictum was pointed out in **Pope v. Prudential Ins. Co. of America** (C. C. A. 6), 29 F. (2d) 185, thus (p. 186):

"In Western Commercial Travelers Ass'n v. Smith

(C. C. A. 8), 85 F. 401, language is used (page 405) which would indicate that the expected or unexpected nature of the result furnished a criterion for determining the accidental character of the cause. So far as it went to this extent, this comment was not required by the questions involved nor by the Supreme Court decision in the Barry case. The Smith case was one where the wearing of a pair of new shoes produced a skin abrasion which became infected, and this infection caused death. Of course, the wearing of the new shoes was intentional, but the skin abrasion was not. It was in itself an accidental result, but it then became the cause of the further injury, and thus was, quite plainly, an accidental cause. In so far as this case tends to confuse the distinction between accidental result and accidental cause, it will be noted that the same general subject was considered by the same Court in Shanberg v. Fidelity Co. (C. C. A.), 158 F. 1, 4, 19 L. R. A. (N. S.) 1206. Here the decision is rested upon the very distinction, and it is said that, though the injury itself might be called an accident, it could not be called the result of an accidental means. The case was one where the insured's heart was ruptured as the result of overexertion. The conclusion at least indicates that that Court did not continue to adhere to the criterion of the dictum in 85 Federal."

The soundness of the above observations was recently confirmed by the Court which had decided the Smith case. In **Order etc. v. Shane** (C. C. A. 8), 64 F. (2d) 55, holding that an "anesthetic death" (on facts substantially the same as in the Dodge case) was not effected, independently of all

other causes, through external, violent and accidental means, the Court said (p. 59):

> "The decision in the case of Western Commercial Trav. Ass'n v. Smith, 85 F. 401, 40 L. R. A. 653 (C. C. A. 8), cited by appellee, when regard is had to the facts involved, is not opposed to the foregoing; and the language in the opinion must be read in the light of the facts and confined thereto."

The foregoing, we submit, demonstrates the error in the construction of the Smith case by the Court in the Dodge case. And yet the latter cited as its only authorities, other than the Barry case, the Smith case and **Aetna Life Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6. The Brand case ("*misplaced artery*") *in turn also was based in part on the same* misleading dictum from the Smith case. Further, it may be noted, the Court in the Brand case expressly recognized that its decision was squarely in conflict with **Smith v. Travelers Ins. Co.**, 219 Mass. 147, L. R. A. 1915 B 872 (discussed in our original brief, pp. 25-27), which it described as "a case more closely resembling in its facts the litigation at bar than any other called to our attention or known to us." The Court in the Brand case also recognized, contrary to the contention of plaintiff herein, that the cause and not the consequences must be the test (p. 8):

> "It is plainly true, and all the cases agree, that in construing this clause, so long found in accident insurance policies, it is the cause and not the conse-

> quence that must be regarded in fixing liability; but we are unable to perceive any reason why one causal element may not be found in the peculiarities, unknown to the sufferer, of his own body."

While agreeing with the former part of this statement, we submit the latter part is erroneous in overlooking the fact that each and every "causal element" must be not only accidental, but external and violent. "Peculiarities * * * of his own body" cannot in any sense be regarded as external or violent.

One of the instructions to the jury in the Barry case which obviously met with approval was the following (131 U. S., p. 109):

> "'If you find that injury was sustained, then the next question is: Was it effected through **external, violent and accidental means**? This is a pivotal point in the case, and therefore vitally important. **The means must have been external, violent and accidental.** Did an accident occur in the means through which the alleged bodily injury was effected?"

The policy allows the benefit only if the injury "is effected solely" through causes that are—

(a) External.

(b) Violent.

(c) Accidental.

Each cause relied on as such must have all three of these attributes. It is not sufficient that there be a combination

of causes each of which has one or more of such attributes, but none of which has all. And yet, boiled down, that is plaintiff's case. She urges two causes of the injury, to wit, (a) the sun, and (b) the condition of insured's body. (Even aside from the third count, the death necessarily was due in part to an internal condition of some sort, since the declaration expressly admits that the sun heat was not sufficient to kill insured in normal condition.) But now testing these respective causes we find:

(1) That the sun, and insured's physical exertions under its rays, while external and (we may assume) violent, were in no possible sense accidental. Insured's exposure thereto was not in any way unintended or unexpected. And it was not even to any degree involuntary (as in some of the sunstroke cases) since he was voluntarily proceeding in the sun to indulge in his golf purely as a pastime.

(2) That insured's abnormal physical condition, while unknown and hence to that extent accidental, if a mere condition can constitute an "accident" (which we deny), was in no possible sense either external or violent.

We may readily distinguish cases of unexpected and unforeseen injuries where all causes contributing to the injury are external. Such are cases of poison drunk unintentionally, infection by germs unintentionally introduced, and injuries of every nature caused by unintended external force without the intervention or co-operation of an internal cause or causes. Also may be distinguished certain

cases on policies insuring against injuries effected through "accidental means," but without the further restriction as to "violent" and "external." In **Lewis v. Ocean Accident etc.**, 224 N. Y. 18, relied on in the Brand case and in the cases at bar, the pertinent policy provision there referred only to "accidental means" without the requirement that such means be also external and violent. Furthermore, as shown in the discussion of that case in our original brief (pp. 10-11), the unintended introduction of the germ by a pricking of a pimple was undoubtedly accidental. That the Lewis case affords no support for liability based on an internal abnormal condition of the insured was pointed out in **Barnstead v. Commercial Travelers' etc.**, 204 App. Div. 473, 198 N. Y. S. 416, denying recovery on a policy against injuries "caused solely and exclusively by external, violent and accidental means," where the death resulted from the administration of a gas which, because of insured's hypersusceptibility (and hence "abnormal condition"), resulted fatally. After pointing out that the gas was administered just as intended, the Court said (198 N. Y. S., pp. 417-18):

> "There was nothing accidental in the means, but only in the result, which was occasioned by the condition of the insured (Appel v. Aetna Life Ins. Co., 86 App. Div. 83, 87, 83 N. Y. Supp. 238, affirmed 180 N. Y. 514, 72 N. E. 1139; Fane v. National Ass'n of Railway Postal Clerks, 197 App. Div. 145, 146, 149, 188 N. Y. Supp. 222).
>
> "This case is to be distinguished from Townsend

v. Commercial Travelers' Mut. Accident Assn. of America, 231 N. Y. 148, 131 N. E. 871, 17 A. L. R. 1001, in which the injury resulted from an infected needle, and **Lewis v. Ocean Accident & Guarantee Corporation, Limited, of London, England**, 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129, from an infected pin, in this: That, while the person had intended to use the instrument, he had not intended to use a poisoned instrument, and the injury was the direct and proximate cause (result?) of the poison on the instrument."

The argument based on the Dodge case, that the intentional administration of an anaesthetic is transformed into an "unintended act" because the body into which it is administered contains an unknown internal condition, although the act itself in all its physical aspects is exactly as intended, suggests the following inquiry: Suppose A sends to B a bill for services rendered by A to B. A thinks it will be cheerfully received, but the bill is so exorbitant that B, who has a peculiar abhorrence for bills, an idiosyncrasy, so to speak, goes into a frenzy and has an acute attack of indigestion. Is the act of A in sending the bill any the less intentional because of the unexpected effect it has on B?

II.

The Sunstroke Cases.

Plaintiff's supplemental brief cites **Richards v. Standard Accident Insurance Co.**, 58 Utah 622, 200 Pac. 1017, and

an annotation in 17 A. L. R. 1197 (which is supplemented in 61 A. L. R. 1197). We beg first to refer to the discussion of sunstroke cases in our original brief, pages 29-36, and the conclusion there asserted that, before exposure to the sun can be called an "external, violent and accidental cause" of death, it must be shown that the exposure itself was caused by an accidental event. Thus in the Richards case, supra, the duration of exposure to the sun was accidental, as result of mishap. Insured's trip in the desert turned out to be longer than he intended or expected, as result of misinformation as to distance and because horses which were expected for his transportation failed to arrive.

Plaintiff also cites **Lower v. Met. L. Ins. Co.**, ... N. J. ..., 168 Atl. 592. That case, in so far as it holds that death by sunstroke is effected solely by external, violent and accidental means, is in direct conflict with **Nickman v. N. Y. L. Ins. Co.** (C. C. A. 6), 39 F. (2d) 763 (certiorari denied), 282 U. S. 855, with **Paist v. Aetna L. Ins. Co.** (D. C. Pa.), 54 F. (2d) 393, and with all other federal cases dealing specifically with sunstroke (cited and discussed in our original brief, pages 29-35). The opinion in the Lower case, we submit, is difficult to follow in its logic as to "accidental result" and "accidental means," and it ignores the requirement in the policy that the means must be external and violent, as well as accidental. In considering the authorities on sunstroke it ignores the distinction between cases of voluntary and involuntary exposure, and between cases involving policies containing clauses ex-

pressly dealing with sunstroke, and those involving policies containing no such clause, but only the usual insuring clause. These observations, we believe, may be demonstrated by the following analysis of the authorities dealing specifically with sunstroke (which in part has been suggested by and follows the petition to rehear filed in the Lower case).

The view stated in the annotation in 17 A. L. R. 1197 is based on **Bryant v. Continental Cas. Co.**, 107 Tex. 582, and others which have followed it. Prior to the Bryant case it never was doubted that sunstroke was **not** sustained through accidental means. Since that case is responsible for a number of similar decisions, it may be proper to note the peculiar grounds on which the Court proceeded. The primary reason was that the policy there, although an accident policy, contained a specific clause relating to sunstroke (theretofore judicially regarded as a disease), creating a somewhat confusing situation that brought the Texas court to an illogical result. In addition to the conventional insuring clause the policy provided:

> "If sunstroke, freezing, or hydrophobia, due in either case to external, violent and accidental means, shall result, independently of all other causes, in the death of the insured within 90 days from the date of exposure or infection, the company will pay said principal sum as indemnity for loss of life."

Coming to determine the question whether the sunstroke

had been caused by accidental means, the Texas court referred to the Barry case and seized upon the expression "accidental" means "happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected," as being authority for the proposition that a sunstroke, when unexpected, was an injury by accidental means.

Aside from its erroneous interpretation of the Barry case, the decision in the Bryant case is that when an insurer has issued a policy which is ambiguous, the terms being such as to lead the average man to believe that coverage for injury as a result of sunstroke was given, such coverage will be enforced. We may not agree with the Texas court's application of the principle involved, but the correctness of the principle may be granted.

In **Continental Casualty Co. v. Bruden,** 178 Ark. 683, 11 S. W. (2d) 493, the form of the policy, though issued by the same company, was not exactly similar to that involved in the Bryant case. It provided for benefits if the injury should be effected by an "accidental event." A **result** may be an **event,** and the result under consideration, i. e., death by sunstroke, being unforeseen, may properly be considered as an **accident** and hence an **accidental event.** This does not in any way imply that the **result** or **event** was caused by **accidental means.**

Higgins v. Midland Casualty Co., 281 Ill. 431, 118 N. E. 11, follows the Bryant case. We need only point out that

the form of policy sued on and the salient facts were precisely the same as in the Bryant case.

In **Elsey v. Fid. & Cas. Co.**, 187 Ind. 447, 120 N. E. 43, the policy provisions practically parallel the Continental Casualty Company's form of policy. The decision follows that in the Bryant case. Besides, as the Court points out in the Nickman case, the exposure was involuntary.

In **Pack v. Prudential Cas. Co.**, 170 Ky. 47, 185 S. W. 496, the policy contained the usual insuring clause, but also provided that:

> "If **sunstroke**, caused by the direct effect of the sun's rays, or freezing * * * shall result directly, independently and exclusively of all other causes in the death of the insured * * * the company will pay * * * the principal sum."

Although the Court affirmed a judgment for the defendant on the ground that the evidence showed that death had resulted from pneumonia rather than sunstroke, a dictum indicates that the Court deemed sunstroke within the purview of the policy. We respectfully direct this Court's attention to the policy provisions quoted.

In **Mather v. London Guar. & Acci. Co., Ltd.**, 125 Minn. 186, 145 N. W. 963, the Court pointed out that the word "sunstroke," in an exception clause, was stricken out, and on the basis of the evidence which showed that, at the time the policy was issued, this word was stricken with the un-

derstanding that coverage for sunstroke was to be given, affirmed a judgment for the plaintiff. The only legal point in the case relates to the parol evidence rule. If the evidence was admissible a specific coverage was established.

Gallagher v. Fid. & Cas. Co., 148 N. Y. S. 1016, also contained express provisions for death resulting from sunstroke. The relevant terms of the policy were practically the same as those involved in the Bryant and Elsey cases. The following from the opinion will show why the Court thought liability should be imposed (p. 1019):

> "If the policy now under consideration, however, in its defining clause, sunstroke is included within the definition of 'bodily injury'; * * * if there must be a 'preceding accident,' and in consequence thereof subsequent exposure to the sun's rays or excessive heat, followed by the disease known as sunstroke, to come within the terms of this policy, then the clause in question would add little or nothing to the previous binding force of the policy, for the reason that the indemnity would be not for the sunstroke independently considered, but for the accident which preceded it, and for everything resulting therefrom, including such sunstroke. If the language is vague and indefinite, it must be construed most strongly against the insurer."

The above language is plain. The opinions in the Bryant and other cases are less lucid expressions of the same thought. Does this case sustain the proposition insisted upon by the plaintiff? We think not. In further reference

to defendant's contention that it was necessary for sunstroke to be caused by accidental means, the Court made the following significant observation (p. 1018):

> "If this policy had insured only against bodily injury sustained through accidental means, with no definition or qualification, there might be greater strength in such contention."

Continental Cas. Co. v. Clark, 70 Okla. 187, 173 Pac. 453, also involved Continental Casualty Company's particular form of policy. It falls in exactly the same category as the Bryant case.

Railway Official & Employees Acc. Ass'n. v. Johnson, 109 Ky. 261, 58 S. W. 694, is so readily distinguishable that comment is hardly necessary. The policy provided for a reduced liability in the event sunstroke was suffered "not in the line of duty." It was held that sunstroke suffered in the discharge of the insured's duties required the payment of full indemnity—a technical, but perhaps correct, decision.

It thus appears, aside from the unprecedented Lower case, that in every case in which recovery was permitted there was a mishap, or **the policy either contained a specific reference to sunstroke, or did not require that injuries or death be caused by accidental means.**

Now consider the cases in which recovery was denied.

In the early case of **Sinclair v. Maritime Passenger's**

Assur. Co., 3 El. & El. 478, the policy held by the insured **made no specific mention of sunstroke.** The Court, holding that "disease produced by the action of a known cause" cannot "be considered as accidental * * * unless * * * the exposure is itself brought about by circumstances which may give it the character of accident," denied recovery.

In **Dozier v. Fid. & Cas. Co.** (C. C. Mo.), 46 Fed. 446, the Court sustained a demurrer to the complaint. The policy in suit did not refer to sunstroke. It was in the usual form insuring "against bodily injuries sustained through external, violent and accidental means."

Nickman v. N. Y. Life Ins. Co. (C. C. A. 6), 39 F. (2d) 763, and **Paist v. Aetna Life Ins. Co.** (D. C. Pa.), 54 F. (2d) 393 (affirmed, 60 F. [2d] 476), have been discussed in our original brief. The policies there involved, as in the cases at bar, contained only the usual insuring clauses, with no reference whatever to sunstroke.

Continental Cas. Co. v. Pittman, 145 Ga. 641, 89 S. E. 716 (1916), held there could be no recovery even under the Continental Casualty Company form of policy when death was caused by sunstroke. The Court apparently was not confused by the policy, construing it in accordance with its express terms, and, we believe, correctly.

In **Semancik v. Continental Cas. Co.**, 56 Pa. Super. Ct. 392 (1914), the Pennsylvania Court reached the same conclusion as the Georgia Court in the Pittman case. The

form of policy in suit was the same and the facts were substantially similar.

In **Harloe v. California State Life Ins. Co.**, 273 Pac. 560 (Cal. 1928), the question was again whether or not double indemnity was payable. The additional coverage was payable:

> "In the event of death caused by bodily injuries effected exclusively and wholly by external, violent and accidental means."

The Supreme Court of California affirmed a judgment in favor of defendant.

If sunstroke, as the result of voluntary exposure, is held to fall within the purview of the ordinary accident policy or double indemnity rider, then, a fortiori, freezing should do so, for although sunstroke is a disease, freezing is an injury.

In **Inter-Ocean Cas. Co. v. Foster**, ... Ala. ..., 147 So. 127 (1933), the insured voluntarily exposed himself to severe weather for a considerable period of time. The Court reversed a judgment in favor of plaintiff, saying that freezing was "not of itself an accident, but becomes so only when joined with a fortuitous, unusual, unexpected circumstance or event."

In **Lenarick v. National Cas. Co.**, 25 Ins. Law Journal (N. S.), 71 (Minn. 1912), plaintiff sought to recover indemnity for freezing. The Court said:

> "There are doubtless cases holding sunstroke to be an accident within the terms of ordinary accident insurance policies, but unless it is suffered as the result of exposure, caused by some prior accident, the weight of authority and reasoning is to the contrary."

In **Troupe v. Benefit Ass'n of Railway Employes**, 231 N. W. 529 (S. D. 1930), the insured voluntarily remained exposed in cold weather after having fallen in a watery hold and wet his clothing. The Court was of the opinion that the resultant injury was not caused by "accidental means."

In **Tuttle v. Pacific Mutual Life Ins. Co.**, 58 Mont. 121, 190 Pac. 993, the evidence tended to prove that the insured had frozen to death, but there was no evidence as to the cause of his exposure to cold. The Court, reversing a judgment in favor of plaintiff, held that it was incumbent upon plaintiff to prove that death was caused by accidental means. Death from voluntary exposure to extremes of temperature is **not** accidental. On this point the opinion of the Court is as follows:

> "Death resulting from voluntary physical exertion or from intentional acts of the insured is not accidental, nor is the disease or death caused by the vicissitudes of climate or atmosphere the result of an accident."

We should also like the Court to consider the following cases which, for the sake of brevity, we shall not discuss

more fully. Suffice it to say, that in each plaintiff recovered when the insured sustained injuries or met death as the result of involuntary exposure. And in each case the Court correctly proceeded on the theory that it was essential that plaintiff prove that the injury or death was caused by accidental means, that is, that the exposure was caused by accidental means. Furthermore, in each case the Court decided, also correctly, that death or injury was in fact caused by accidental means.

Ashley v. Agricultural Life Ins. Co. of America, 217 N. W. 27 (Mich. 1928) (insured became lost while hunting deer in cold weather);

Continental Cas. Co. v. Hardenberg, 121 Miss. 1, 83 So. 278 (insured unable to extricate himself from a bog, died as a result of exposure);

N. W. Com. Trav. Ass'n v. London Guarantee & Acc. Co., 10 Manitoba 537 (1895) (the wagon in which the insured was traveling, in extreme cold weather, broke down).

We submit that the Lower case is unsound. Certainly it is in conflict with all federal decisions on sunstroke. We respectfully urge that the other cases, considered together, sustain the following propositions:

(A) When an insured meets death or sustains injuries as the result of voluntary exposure to extreme heat or cold, his policy providing coverage only in the event that death or injury is caused by external, violent and accidental

means and containing no reference of any nature to sunstroke or freezing, recovery must be denied.

(B) When, **although the exposure is voluntary**, the policy in suit embodies a specific clause with reference to sunstroke or freezing, tending to induce the belief that such injuries are covered, no matter how caused, such coverage may, under the doctrine of strict construction, be enforced.

The instant cases fall squarely within proposition (A) above.

Our review of the authorities has not included any cases under the Workmen's Compensation Laws. We do not consider such cases of any value because they depend entirely on statute, and do not involve the problem of causation by external, violent and accidental means.

Whether sunstroke is in any aspect a bodily injury as distinguished from disease is discussed in our original brief (pp. 30-36).

Respectfully submitted,

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APPENDIX.

Eng.—Clidero v. Scottish Acc. Ins. Co., 29 Scottish L. R. 303. (Displacement of colon and heart failure from pulling on stocking.)

Sinclair v. Maritime Pass. Assur. Co., 30 L. J. Q. 77, 9 W. R. 342. (Death from sunstroke.)

U. S.—Southard v. Railway Pass. Assur. Co. (D. C. Conn.) Case No. 13,182. 22 Fed. Cases 810. (Injury from jumping and running without stumbling, slipping or falling.)

National Ass'n of Ry. Post. Clerks v. Scott (C. C. A. 2), 155 Fed. 92. (Injury on shin, everything else left conjecture, held verdict should have been directed.)

Preferred Acc. Ins. Co. v. Patterson (C. C. A. 3), 213 Fed. 595. (Death from injury occasioned by slipping while cranking automobile. The Court stated if insured had not slipped and only done what he intended, the injury would not have been by accidental means.)

Maryland Casualty Co. v. Spitz (C. C. A. 3), 246 Fed. 817. (Death from voluntarily rubbing boil on neck with hand, permitting germs to enter.)

Travelers Ins. Co. v. Selden (C. C. A. 4), 78 Fed. 285. (Death from voluntarily running up a hill without stumbling or falling.)

Fidelity & Cas. Co. v. Stacey's Exs. (C. C. A. 4), 143 Fed. 271. (Death from blood poisoning resulting from insured voluntarily striking another.)

Lyon v. Travelers Protective Ass'n of America (C. C. A. 4), 25 Fed. (2d) 596. (Death by rupture blood vessel while driving automobile back into road from woods on dark night.)

Carswell v. Railway Mail Ass'n (C. C. A. 5), 8 F. (2d) 612. (Death from cranking car, resulting in dilation of heart, no slipping.)

Baldwin v. North American Acc. Ins. Co. (C. C. A. 5), 22 F. (2d) 111. (Total disability injury from voluntarily attempting to hold a car starting to move on jack.)

Westmoreland v. Pref. Acc. Ins. Co. (C. C. Ga.), 75 Fed. 244. (Death occasioned by voluntary administration of chloroform in the usual way.)

Pope v. Prudential Ins. Co. of America (C. C. A. 6), 29 F. (2d) 185. (Death from raising short pedicle so as to remove stone from kidney, no slip or mishap.)

Nickman v. New York Life Ins. Co. (C. C. A. 6), 39 F. (2d) 763. (Death from sunstroke.) Certiorari denied 282 U. S. 855.

Wallace v. Standard Life Ins. Co. (C. C. A. 6), 63 F. (2d) 211. (Death from ascending flight of stairs.)

Seipel v. Equitable Life Ins. Co. (C. C. A. 7), 59 F. (2d) 544. (Hernia from lifting wheel into place on autobile—no slip.)

Shanberg v. Fidelity & Cas. Co. (C. C. A. 8), 158 Fed. 1. (Death after carrying one end of door without stumbling or falling.)

Brown v. Maryland Cas. Co. (C. C. A. 8), 55 F. (2d) 159. (Hernia resulting from being shoved while sitting on bed.)

Order v. Shane (C. C. A. 8), 64 F. (2d) 55. (Death from voluntary administration of butyn.)

Hastings v. Travelers Ins. Co. (C. C. Wash.), 190 Fed. 258. (Death from voluntarily and intentionally raising up and down on arms of chair.)

Chase v. Business Men's Assur. Co. (C. C. A. 10), 51 F. (2d) 34. (Drinking contaminated water, causing typhoid fever.)

Ala.—Inter-Ocean Casualty Co. v. Foster, 147 Ala. 127. (Freezing from voluntarily exposing himself to cold.)

Stokely v. Fid. & Cas. Co., 193 Ala. 90, 69 So. 64. (Insured coughed, bursting stitches of wound occasioned by previous operation for appendicitis.)

Cal.—Rock v. Travelers Ins. Co., 172 Cal. 462, 156 Pac. 1029. (Death from carrying heavy casket downstairs, without slipping or stumbling.)

Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 Pac. 835. (Death from voluntarily swimming upstream.)

Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 209 Pac. 26. (Rupture by lurch of plow, not greater than ordinarily incident to plowing.)

Harloe v. California State Life Ins. Co., 273 Pac. 560. (Death by sunstroke.)

Bennetts v. Occidental Life Ins. Co. (Cal.), 178 Pac. 964. (Death by lifting pipe from sump hole, no slip.)

Conn.—Southard v. Railway Pass. Assur. Co., 34 Conn. 574. (Hernia from voluntarily jumping from car and running distance without stumbling or falling.)

Stanton v. Travelers Ins. Co. (Conn.), 78 Atl. 317. (Death from strain of carrying basket, resulting in second attack of appendicitis.)

Del.—Metropolitan Life Ins. Co. v. Landsman (Del.), 165 Atl. 563. (Injury of salesman in lifting sack of potatoes in usual course of employment. This case also holds contract must be construed according to established rules of law.)

Ga.—Cobb v. Pref. Mut. Acc. Ass'n, 96 Ga. 818, 22 S. E. 976. (Blindness, presumably occasioned by walking with heavy grips, without slipping or falling.)

Fulton v. Metropolitan Cas. Ins. Co., 19 Ga. App. 127, 91 S. E. 228. (Death from pulling and pushing boat from dry land into water. No involuntary muscular effort or exertion occurred in the doing of the act which preceded injury.)

Johnson v. Aetna Life Ins. Co., 101 S. E. 134. (Death from ruptured blood vessel sustained while changing automobile tires. No evidence of fall, slip or blow of any kind no presumption.)

Continental Cas. Co. v. Pittman, 145 Ga. 641. (Death from sunstroke.)

Ill. Globe Acc. Ins. Co. v. Gerisch (Ill.), 45 N. E. 563. (Death from voluntarily lifting box of cinders.)

Wayne v. Travelers Ins. Co., 20 Ill. App. 493. (Death from approved medical hypodermic injection of morphine.)

Crandall v. Continental Cas. Co., 179 Ill. App. 330. (Death from swallowing a piece of meat pie, complicated by choking and abscess. There is no liability if an existing condition contributes with the injury to bring about death.)

Ind.—Schmid v. Indiana Trav. Acc. Ass'n, 42 Ind. App. 483, 85 N. E. 1032. (Paralysis of heart from carrying grip upstairs in high altitude. Result of voluntary exertion or vicissitudes of climate or atmosphere, although unexpected and unforeseen, not due to accidental means.)

Husbands v. Indiana Travelers Acc. Ass'n (Ind.), 133 N. E. 130. (Death from rupture of blood vessel while shaking down furnace in usual manner.)

Ia.—Carnes v. Iowa Trav. Men's Ass'n, 106 Ia. 281, 76 N. W. 683. (Death from intentionally taking a known quantity of morphine, if insured intends to take amount she does take and misjudges effect, although unforeseen and unexpected, not due to accidental means.)

Feder v. Iowa State Trav. Men's Ass'n, 107 Ia. 538, 78 N. W. 252. (Death from rupture while reaching over chair to close shutters; no evidence insured fell, slipped, etc., or that anything occurred which was not foreseen, except rupture; not due to accidental cause.)

Smouse v. Iowa State Trav. Men's Ass'n, 118 Ia. 436, 92 N. W. 53. (Death from voluntary attempts to remove night shirt, not due to accidental cause.)

Lehman v. Great Western Acc. Ass'n, 155 Ia. 737, 133 N. W. 752. (Appendicitis occasioned by bowling without slipping or falling.)

Martin v. Interstate Business Men's Ass'n (Ia.), 174 N. W. 577. (Death from eating oranges while separating unmarketable from marketable ones. Held no element of accident in means causing bodily disorder.)

Ky.—Salinger v. Fid. & Cas. Co. of N. Y., 178 Ky. 369, 198 S. W. 1163. (Loss of sight while weakened from voluntary lifting of boxes. Held no accidental means.)

Bahre v. Trav. Protective Ass'n, 211 Ky. 435, 277 S. W. 467. (Injury from jolt from riding in automobile over rough road.)

Transylvania Cas. Co. v. Allen's Administrator (Ky. C. of A.), 209 S. W. 44. (Hernia increasing in size, contention necessarily accidental means. Held no accidental means.)

Mass.—Smith v. Travelers Ins. Co., 219 Mass. 147, 106 N. E. 607. (Death from meningitis occasioned by volun-

tarily sniffing medicine into nose, which, by reason of peculiar construction of bones in head, carried germs into brain.)

Henderson v. Travelers Ins. Co. (Mass.), 160 N. E. 415. (Infection from entering of water in eyes and ears while diving.)

Mich.—Ashley v. Agricultural Life Ins. Co. (Mich.), 217 N. W. 27. (Insured became lost while hunting in cold weather, because exposure accidental he recovered, but held freezing in and of self not accidental means.)

Minn.—Lenarick v. National Cas. Co. (Minn. 1911), 25 Ins. Law Journal (N. S.), p. 71. (There are doubtless cases holding sunstroke to be an accident within the terms of ordinary accident insurance policies, but unless it is suffered as the result of exposure, caused by some prior accident, the weight of authority and reasoning is to the contrary.)

Miss.—United States Cas. Co. v. Malone (Miss.), 87 So. 8[illegible] (Voluntary rubbing toe with towel.)

Mo.—Caldwell v. Travelers Ins. Co. (Mo.), 267 S. W. 90[illegible]. (Death from bowel obstruction after operation for hernia.)

Zach v. Fid. & Cas. Co. of N. Y. (Mo. Ct. App.), 272 S. W. 995. (Blood poison following voluntary extraction of tooth.)

Mont.—Tuttle v. Pacific Mut. Life Ins. Co., 190 Pac. 993. (Death from freezing—held it was incumbent upon plaintiff to prove accidental means. Death from voluntary exposure to extremes of temperature is **not** accidental. No presumption can be indulged in.)

N. Y.—Appel v. Aetna Life Ins. Co., 83 N. Y. S. 238,

affirmed 180 N. Y. 514. (Appendicitis from riding bicycle without fall or collision, caused by usual movement of psoas muscle.)

Niskern v. United Bro. of C. & J. of America, 87 N. Y. S. 640. (Disability caused by rupture of blood vessel from voluntary lifting, not accidental means.)

Fane v. National Ass'n of Railway Mail Clerks, 188 N. Y. S. 222. (Hernia while lifting mail bags in customary manner without having slipped or anything out of the ordinary happening.)

Barnstead v. Com. Trav. Mut. Acc. Ass'n, 198 N. Y. S. 416. (Died after taking gas for tooth extraction.)

Dinnie v. United Com'l Trav., 169 N. W. 811 (N. D. Sup. Ct. 1918). (The Court held a complaint containing no allegations that the death of insured was caused through external, violent and accidental means did **not** state a cause of action.)

Ohio.—New Amsterdam Cas. Co. v. Johnson, 91 Ohio 155, 110 N. E. 475. (Death from heart dilation occasioned by voluntarily plunging into cold bath.)

Pa.—Hesse v. Travelers Ins. Co. (Pa.), 149 Atl. 96. (Death due to hypersusceptibility to novocaine.)

Semancik v. Continental Cas. Co., 56 Pa. Sup. Ct. 392. (Death due to sunstroke.)

Conti v. Benefit Ass'n of Railway Employees, 158 A. 205. (Death following removing jack from locomotive, complicated with hernia.)

R. I.—Kimball v. Mass. Acc. Co. (R. I.), 117 Atl. 228. (Death due to germs entering through open boil. Held it should appear the cause or means governed the result and not the result the cause.)

S. C.—Young v. Continental Cas. Co., 122 S. E. 577. (Climbed ladder to get book from shelf, stinging pain in groin—no slip or fall.)

S. D.—Troupe v. Benefit Ass'n of Railway Employees (S. D.), 231 N. W. 529. (Insured voluntarily remained exposed to cold after falling in water hole.)

Tenn.—Stone v. Fid. & Cas. Co., 133 Tenn. 672, 182 S. W. 252. (Voluntary lifting of arm, causing loss of sight.)

Ramsey v. Fid. & Cas. Co., 143 Tenn. 42, 223 S. W. 841. (Death from injury to gum in voluntary act of pulling tooth.)

SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1933.

Florence Samuels Landress, Petitioner,
vs.
Phoenix Mutual Life Insurance Company and Travelers Insurance Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari to review a judgment of the Court of Appeals for the Sixth Circuit, 65 F. (2d) 232, which affirmed a judgment of the district court, denying recovery on two policies of accident insurance. Separate suits brought by petitioner, the beneficiary of the policies under which her deceased husband was the insured, were consolidated and were heard and decided on demurrer. The insured, while playing golf, suffered a sunstroke, from which he died. Petitioner sought recovery of amounts stipulated, in one policy, to be paid if death should result

"directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and not directly or indirectly, wholly or partly from disease or physical or mental infirmity",

and, in the other policy, if death should result

"from bodily injuries effected directly and independently of all other causes through external, violent and accidental means".

Both declarations, in each of four counts, alleged that the deceased in the month of August, while in good health and while playing golf in his accustomed manner at a place where many others were playing without injury, was suddenly and unexpectedly overcome from the force of the sun's rays upon his head and body and that shortly afterward he died; that an autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death. In one count of each declaration it was alleged that at the time the insured received the injury resulting in his death there was, unknown to him, a temporary dis-

order or condition of his body, not amounting to a physical or mental infirmity within the meaning of the policies, which, for the time being, rendered him more than ordinarily sensitive to the heat of the sun and that this temporary and unknown condition "intervened between his intentional act of playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed".

Petitioner argues that the death, resulting from voluntary exposure to the sun's rays under normal conditions, was accidental in the common or popular sense of the term and should therefore be held to be within the liability clauses of the policies. But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure "was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident", see *Lewis* v. *Ocean Accident & Guarantee Corp.*, 224 N. Y. 18, 21; see also *Aetna Life Insurance Co.* v. *Portland Gas & Coke Co.*, 229 Fed. 552—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental. The external means is stated to be the rays of the sun, to which the insured voluntarily exposed himself. Petitioner's pleadings do not suggest that there was anything in the sun's rays, the weather or other circumstances, external to the insured's own body and operating to produce the unanticipated injury, which was unknown or unforeseen by the insured.

We do not intimate that injuries resulting from as impalpable a cause as the inadvertent introduction into the body of noxious germs may not be deemed to be effected by external accidental means. See *Western Commercial Travelers Ass'n* v. *Smith*, 85 Fed. 401; *Jensma* v. *Sun Life Assur. Co.*, 64 F. (2d) 457. Nor do we say that in other circumstances an unforeseen and hence accidental result may not give rise to the inference that the external means was also accidental. Compare *Jensma* v. *Sun Life Assur. Co., supra; Gustafson* v. *New York Life Insurance Co.*, 55 F. (2d) 235. But, in the light of such knowledge as we have, no such inference can arise from the bare allegation of death by sunstroke,

compare *Pope* v. *Prudential Insurance Co.*, 29 F. (2d) 185; *Ryan* v. *Continental Casualty Co.*, 47 F. (2d) 472, with no indication that some unforeseen or unintended condition or combination of circumstances, external to the state of the victim's body, contributed to the accidental result. The petitioner has thus failed to plead facts establishing the liability defined by the policy.

In *United States Mutual Accident Association* v. *Barry*, 131 U. S. 100, the insured suffered an internal injury caused by his jumping voluntarily from a platform to the ground, a distance of four or five feet. Recovery was allowed of amounts stipulated by the policy to be paid upon proof of bodily injury "effected through external violent and accidental means". There was evidence from which the jury might have inferred that the insured alighted in a manner not intended, causing a jar or shock of unexpected severity. This Court held that the trial judge correctly left to the jury the question whether the insured jumped or alighted in the manner he intended and properly charged that, if he did not, it might find that the injury was caused by accidental means, pp. 109, 110, 121.

This distinction between accidental external means and accidental result has been generally recognized and applied where the stipulated liability is for injury resulting from an accidental external means. See *Aetna Life Insurance Co.* v. *Brand*, 265 Fed. 6; *Lincoln National Ins. Co.* v. *Erickson*, 42 F. (2d) 997; *Jensma* v. *Sun Life Assur. Co., supra*; *Order of United Commercial Travelers* v. *Shane*, 64 F. (2d) 55; contra *Mutual Life Insurance Co.* v. *Dodge*, 11 F. (2d) 486. And injury from sunstroke, when resulting from voluntary exposure by an insured to the sun's rays, even though an accident, see *Ismay, Imrie & Co.* v. *Williamson* [1908] A. C. 437, has been generally held not to have been caused by external accidental means. *Nickman* v. *New York Life Ins. Co.*, 39 F. (2d) 763; *Paist* v. *Aetna Life Insurance Co.*, 54 F. (2d) 393; *Harloe* v. *California State Life Insurance Co.*, 206 Cal. 141; *Continental Casualty Co.* v. *Pittman*, 145 Ga. 641; *Semancik* v. *Continental Casualty Co.*, 56 Pa. Super. Ct. 392; see *Elsey* v. *Fidelity & Casualty Co.*, 187 Ind. 447; *Richards* v. *Standard Accident Insurance Co.*, 58 Utah 622; contra, *Continental Casualty Co.* v. *Bruden*, 178 Ark. 683; *Lower* v. *Metropolitan Life Insurance Co.* (N. J.), 168 Atl. 592.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1933.

Florence Samuels Landress, Petitioner,
vs.
Phoenix Mutual Life Insurance Company and Travelers Insurance Company, Respondents.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1934.]

Mr. Justice Cardozo, dissenting.

I am unable to concur in the decision of the Court.

1. A cause does not cease to be violent and external because the insured has an idiosyncratic condition of mind or body predisposing him to injury. *Silverstein* v. *Metropolitan Life Insurance Co.*, 254 N. Y. 81; *Leland* v. *Order of U. C. Travelers*, 233 Mass. 558, 564; *Collins* v. *Casualty Co.*, 224 Mass. 327; *Taylor* v. *N. Y. Life Insurance Co.*, 176 Minn. 171. Under a policy phrased as this one, the insurer may be relieved of liability if the predisposing condition is so acute as to constitute a disease. See cases *supra*. Here the complaint alleges that the idiosyncrasy was not a physical or mental disease, and that it appeared from an autopsy that there was no bodily infirmity or disease which could have been a contributing cause of death. Since the case is here on demurrer, those allegations must be accepted as true. The plaintiff may be unable to prove them at the trial. She should have the opportunity. There has been no failure to "plead facts establishing the liability defined by the policy."

2. Sunstroke, though it may be a disease according to the classification of physicians, is none the less an accident in the common speech of men. *Ismay, Imrie & Co.* v. *Williamson*, [1908] A. C. 437, 439. *Lane* v. *Horn & H. Baking Company*, 261 Pa. 329. The suddenness of its approach and its catastrophic nature (*Matter of Connally* v. *Hunt Furniture Co.*, 240 N. Y. 83, 87) have made that quality stand out when thought is uninstructed in the mysteries of science. *Lower* v. *Metropolitan Life Insurance Co.*, Court of Errors & Appeals of N. J., September, 1933, 168 Atl. Rep. 593, collating the decisions. Violent it is for the same

reason, and external because the train of consequences is set in motion by the rays of the sun beating down upon the body, a cause operating from without.

"In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death." Per Loreburn, L. C., in *Ismay, Imrie & Co.* v. *Williamson, supra.*

3. The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. "Probably it is true to say that in the strictest sense and dealing with the region of physical nature there is no such thing as an accident." Halsbury, L. C. in *Brintons* v. *Turvey*, L. R. [1905] A. C. 230, 233. Cf. *Lewis* v. *Ocean Accident & Guaranty Corp.*, 224 N. Y. 18, 21; *Innes* v. *Kynoch*, [1919] A. C. 765, 775. On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the company. *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 174; *Stipcich* v. *Metropolitan Life Insurance Co.*, 277 U. S. 311, 322. The proposed distinction will not survive the application of that test.

When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. So courts of high authority have held. *Lower* v. *Metropolitan Life Insurance Co., supra* (a case of sunstroke); *Gallagher* v. *Fidelity & Casualty Co.*, 163 App. Div. 556; 221 N. Y. 664 (sunstroke); *Jensma* v. *Sun Life Assurance Co.*, 64 F. (2d) 457; *Western Commercial Travelers' Association* v. *Smith*, 85 Fed. 401; *Mutual Life Insurance Co.* v. *Dodge*, 11 F. (2d) 486; *Lewis* v. *Iowa State Traveling Men's Association*, 248 Fed. 602.[1] So the holder of this policy might reasonably assume.

[1]The decisions are collated in 17 A. L. R. 1197, with the comment that by the weight of authority sunstroke suffered unexpectedly is within the coverage of a policy insuring against injury by external, violent and accidental means. Compare Continental Casualty Co. v. Bruden, 178 Ark. 683; Higgins

If he had thought about the subject, he might have had his impressions fortified by the ruling of the House of Lords that a workman who suffers a heat-stroke has a claim for relief under the Workmen's Compensation Act. *Ismay, Imrie & Co.* v. *Williamson, supra.* The British Act (6 Edw. 7, c. 58, sec. 1) gives compensation for personal injury "by accident" arising out of and in the course of the employment. Injury by heat-stroke was held to be injury "by accident". The result would hardly have been different, certainly one insured would not have looked for any difference, if for the phrase "injury by accident" the lawmakers had substituted the words injury "by means of accident," or injury by accidental means.

The principle that should govern the interpretation of the policy in suit was stated with clarity and precision by Sanborn, J., in a case quoted in the margin.[2]

The insured did not do anything which in its ordinary consequences was fraught with danger. The allegations of the complaint show that he was playing golf in the same conditions in which he had often played before. The heat was not extraordinary; the exertion not unusual. By misadventure or accident, an external force, which had hitherto been beneficent, was transformed

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v. Midland Casualty Co, 281 Ill. 431; Elsey *v.* Fidelity & Casualty Co., 187 Ind. 447; Continental Casualty Co. *v.* Clark, 70 Okla. 187; Bryant *v.* Continental Casualty Co., 107 Tex. 582; Richards *v.* Standard Accident Insurance Co., 58 Utah 622.

[2]Western Commercial Travelers' Association *v.* Smith, *supra*, p. 405: "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means."

The principle thus formulated has been accepted in many of the decisions cited in footnote 1, *supra.*

into a force of violence, as much so as a stroke of lightning. The opinion of the court concedes that death "from sunstroke, when resulting from voluntary exposure to the sun's rays," is "an accident." Why? To be sure the death is not intentional, but that does not make it an "accident" as the word is commonly understood, any more than death from indigestion or pneumonia. If there was no accident in the means, there was none in the result, for the two were inseparable. No cause that reasonably can be styled an accident intervened between them. The process of causation was unbroken from exposure up to death. There was an accident throughout, or there was no accident at all.

The judgment should be reversed.